

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

MARVEL CHARACTERS, INC.,

Plaintiff,

v.

PATRICK S. DITKO, in his capacity as  
Administrator of the Estate of Stephen J.  
Ditko,

Defendant.

**Case No.: 1:21-cv-07957-LAK**

Hon. Lewis A. Kaplan

**PATRICK S. DITKO'S RESPONSE  
TO MARVEL'S LOCAL RULE 56.1  
STATEMENT OF MATERIAL FACTS**

PATRICK S. DITKO, in his capacity as  
Administrator of the Estate of Stephen J.  
Ditko,

Counterclaimant,

v.

MARVEL CHARACTERS, INC. and DOES  
1-10, inclusive,

Counterclaim-Defendants.

Pursuant to Local Civil Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York (“Local Rules”), Defendant and Counterclaimant Patrick S. Ditko, as Administrator of the Estate of Stephen J. Ditko (“Counterclaimant”), by and through its undersigned counsel, respectfully submits the following Response to Marvel Character Inc.’s (“Marvel”) statement of material facts.

1. **Marvel’s Statement:** The companies now known as “Marvel” were preceded by numerous predecessors-in-interest doing business as the Marvel Comics Group, including: Martin and Jean Goodman, their Magazine Management Company partnership, and their wholly-owned entities Atlas Magazines, Inc., Canam Publisher Sales Corp., Non-Pareil Publishing Corp., Vista Publications, Inc., and Magazine Management Company, Inc. (New York); Perfect Film & Chemical Corp. (“Perfect”) (later renamed as Cadence Industries Corp. (“Cadence”)); Magazine Management Company, Inc. (Delaware); and Marvel Entertainment Group, Inc. (collectively, “Marvel”). *See* Declaration of Eli Bard (“Bard Decl.”) ¶ 2; Bard Decl., Ex. 1 (reflecting incorporation and later dissolution of Marvel entities in existence during the early 1960s and their common ownership by Martin Goodman); Bard Decl., Ex. 2 (showing Martin and Jean Goodman’s ownership of Marvel); Bard Decl., Ex. 4 (same); Bard Decl., Ex. 3 (listing various “active corporations and magazines”); Bard Decl., Ex. 5 at 2-3 (reporting on Magazine Management Company, a “[p]artnership formed 1942” that acts as “the managing organization for the various publishing corporations in which Martin Goodman is a principal or a stockholder”); Bard Decl., Ex. 6 at 3 (“Magazine Management Company . . . renders administrative services to and exercises the over-all control over” other Goodman-owned publishing corporations); Bard Decl., Ex. 7 at 5 (“Martin Goodman . . . formulates, directs and controls the acts and practices of each corporate respondent either directly or through the

partnership, Magazine Management Company . . . .”); Bard Decl., Ex. 8 at 5-6 (A “group of commonly owned and controlled corporations collectively known as the Marvel Comics Group” published comic books “frequently includ[ing] material concerning characters featured in other publications of the Group”); Bard Decl., Ex. 10 at 2, 9 (June 28, 1968 agreement for sale of the Goodmans’ Marvel Comics business to Perfect, providing that all then-existing copyrights be assigned to Perfect (the “June 28, 1968 Sale”)); Bard Decl., Ex. 11 at 3 (December 7, 1978 acknowledgment of assignment between Martin and Jean Goodman and Perfect’s successor-in-interest, Cadence, affirming, pursuant to the June 28, 1968 Sale, assignment of all “copyrights and renewals and extensions of copyrights,” including all publications listed on Schedule B annexed thereto (including those listed in the termination notices (the “Works”))); Bard Decl., Ex. 9 at 2 (“Cadence Industries Corporation admits that its Marvel Comics Group division is engaged in the business of magazine publishing . . . .”); Bard Decl., Ex. 12 at 2-3 (January 1, 1972 assignment from Cadence’s wholly owned subsidiary, Magazine Management Co., Inc. (Delaware) to Cadence of all copyrights relating to “its Marvel Comics Group Division or the comics business”); Bard Decl., Ex. 13 at 2-3 (December 29, 1986 assignment from Cadence to MEG of all “copyrights relating to [Cadence’s] Marvel Comics Group business,” including all publications listed on Schedule A annexed thereto (including the Works)); Bard Decl., Ex. 14 (November 20, 1986 purchase agreement between Cadence Industries Corporation and New World Pictures, Ltd.); Bard Decl., Ex. 15 (November 4, 1988 acquisition agreement between New World Entertainment, Ltd. and Andrews Group Incorporated relating to MEG); Bard Decl., Ex. 16 (September 1, 1995 assignment from MEG to MCI of all copyrights “in its comics books and comic book-related works,” including all publications listed on Schedule A annexed thereto (including the Works)); Declaration of Molly M. Lens (“Lens Decl.”), Ex. 75 (Goodman

certifying as president of various publishing corporations that he, Jean Goodman, and said corporations conducted business as “Marvel”); Lens Decl., Ex. 76 (Goodman certifying as president of various publishing corporations that he, Jean Goodman, and said corporations conducted business as “Marvel Comics Group”); Lens Decl., Ex. 18 72:25-73:11 (Goodman discussing his publishing entities, explaining that “each corporation st[ood] on its own” but he “own[ed] them either completely or [his] wife may [have] own[ed] some stock in some of them”); Lens Decl., Ex. 13 11:24-12:3 (“It had many different names over the years, and it finally became Marvel.”); Lens Decl., Ex. 6 9:6-10:1 (“As far as I know, Marvel Comics Group did the comic books and Magazine Management was the overall company that did all the other magazines. They had all different kinds of magazines.”); Lens Decl., Ex. 6 6:13-25 (“[Marvel was] bought by a company called Perfect Film and Chemical which later became Cadence Industries and that was later sold to New World and then it ended up with where it is now.”); *see also* Lens Decl., Ex. 8 16:11-20; Lens Decl., Ex. 8 17:16-25; Lens Decl., Ex. 4 83:10-13; Lens Decl., Ex. 8 15:2-8; Lens Decl., Ex. 17 3:18-4:9.

**RESPONSE:** Counterclaimant admits that the companies it lists are Marvel’s alleged predecessors but denies the above statement to the extent it implies that in the relevant Period there was any corporate relationship or other legal relationship between Goodmans’ independent shell companies, Atlas Magazines, Inc., Canam Publisher Sales Corp., Non-Pareil Publishing Corp., Vista Publications, Inc. (each dissolved in 1968) and the Goodmans’ partnership Magazine Management Company (“Magazine Management”), other than common ownership. Counterclaimant further disputes this statement to the extent it implies that “Marvel Comics Group” had any corporate or legal status or significance in the Period because it was not a legal entity in the Period and was merely a name Magazine

Management sometimes placed on the cover of some of the comic books it published. In 1973, well after the Period, Perfect Film and Chemical (which in 1968 had purchased all of the publishing assets of Magazine Management and Goodman's numerous shell companies) renamed itself Cadence Industries and renamed Magazine Management's publishing business the Marvel Comics Group. *See* Lens Decl., Ex. 18 72:25-73:11 (Goodman discussing his publishing entities, explaining that "each corporation st[ood] on its own"); Declaration of Marc Toberoff ("Toberoff Decl."), Ex. 46 (1966-67 list Goodman's myriad entities with no mention of "Marvel Comics Group"); Bard Decl., Ex. 10 (June 28, 1968 sales agreement of Magazine Management and the shell companies' assets to Perfect); Bard Decl., Ex. 1 (reflecting dissolution of the shell companies Atlas Magazines, Inc., Canam Publisher Sales Corp., Non-Pareil Publishing Corp., Vista Publications, Inc. ); Toberoff Decl., Ex. 43 (March 22, 1975 Agreement between Marvel Comics Group and Gene Colan); Bard Decl., Ex. 13 at 2-3 (December 29, 1986 Cadence agreement "relating to [Cadence's] Marvel Comics Group business.").

2. **Marvel's Statement:** Steven J. Ditko ("Ditko") was an artist who worked for Marvel from approximately 1955 to 1965, including a period from 1963 to 1965 where Ditko worked nearly exclusively at Marvel, before working again for Marvel from 1979 into the 1990s. Lens Decl., Ex. 45 at 3; Lens Decl., Ex. 44 at 3; Lens Decl., Ex. 25; Lens Decl., Ex. 15 19:1-10; Lens Decl., Ex. 39 at 5; Lens Decl., Ex. 2 92:11-20; Declaration of Roy Thomas ("Thomas Decl.") ¶ 19.

**RESPONSE:** Counterclaimant disputes Marvel's use of the phrase "worked *for* Marvel" (emphasis added) to the extent it implies Steve Ditko ("Ditko") was employed or hired by any "Marvel" entity. Diko was an independent artist, who had no employment

**contract with, nor was he employed by, any “Marvel” entity, nor did Ditko and “Marvel” share the bilateral rights and obligations that hiring entails during the relevant 1962-1965 period (the “Period”).** Marvel has not produced any contemporaneous agreement with Ditko from the Period for his creative services, nor any other evidence reflecting any bilateral rights and obligations between Ditko and Magazine Management (nor any other alleged Marvel predecessor) in the Period, nor has Marvel alleged that any such agreement or bilateral legal rights and obligations existed between such parties in the Period. *See* Toberoff Decl. Ex. 1 at 10, 13 (Supplemented Expert Report of Mark Evanier (“Evanier Rep.”) providing historical context giving rise to Marvel’s use of freelance creators and explaining that, when Magazine Management ran out of surplus artwork to publish, it began to purchase artwork and scripts from freelancers at a low page rate and that freelancers did not have written contracts with Magazine Management during the 1950s or 1960s and describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 14 at 10-11 (Rebuttal Expert Report of Mark Evanier (“Evanier Rebuttal Rep.”) explaining that it was not the custom and practice of Marvel or other publishers in the comic book industry to have written contracts with freelance creators during the Period); Ex. 2 at 71:17-74:5 (Larry Lieber (“Lieber”) testifying that he sold freelance work to Marvel in the 1950s and 1960s, had no contract with Marvel, and that Marvel was not obligated to buy his submitted freelance material); Ex. 3 at 159:24-160:4, 194:11-195:3, 207:12-22, 211:7-212:3 (John V. Romita (“Romita”) testifying that he did not have a contract with Marvel as a freelancer and that freelancers were free to sell work to other publishers); Ex. 5 at 371:3-25 (Stan Lee (“Lee”) testifying that Marvel “would only buy what [it] needed”); Ex. 6 at 36:17-21, 202:2-20 (Roy Thomas (“Thomas”) testifying that he had no contract with Marvel until 1974); Ex. 8 ¶ 10 (Joe

Sinnott (“Sinnott”) attesting that he had no contract with Marvel and Marvel was very small and disorganized in the 1950s and 1960s); Ex. 8 ¶ 11 (Sinnott attesting that Marvel had no obligation to buy pages of his work and that Marvel paid only for the pages it wanted); Ex. 9 ¶ 8 (James Steranko (“Steranko”) Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 10 ¶ 12 (Richard Ayers (“Ayers”) attesting that he had no contract with Marvel from 1959 to 1975); Ex. 11 ¶ 9 (Gene Colan (“Colan”) attesting that he had no contract with Marvel until 1975); Ex. 13 ¶ 5-7 (Neal Adams (“Adams”) attesting that he had no contract with Marvel in the 1960s or 1970s and that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 17 at 39:25-40:4, 51:20-52:4, 298:8-14, 301:14-303:7 (Thomas testifying that he had no written contract from 1965 to 1974 and that Marvel did not have contracts with freelancers prohibiting them from selling work to other publishers); Ex. 22 at 287:22-288:12 (Lieber testifying that he had no contract with Marvel in the 1950s or 1960s); Ex. 24 at 79:2-8 (Paul Levitz (“Levitz”) testifying that Marvel did not have contracts with any freelancer until the mid-1970s); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics).

**Counterclaimant further disputes the use of the term “Marvel,” as Ditko was only ever paid by Magazine Management Company (“Magazine Management”), and not by any of the shell companies (e.g., Vista Publications, Inc. (“Vista”), Atlas Magazines, Inc. (“Atlas”), Non-Pareil Publishing Corp. (“Non-Pareil”))—which Marvel claims were its predecessors-in-interest and the legal “authors” of Ditko’s creative material as the shell companies’ “works made for hire”—Ditko also had no contract with any of them and, as**

**the shell companies had no employees, he had no contact with any employee of the shell companies.** *See* Dkt. 1 (Marvel’s Complaint), ¶ 4 (alleging Marvel owns “the copyrights in the famous Marvel characters and comics on which Ditko worked” “as evidenced by the relevant copyright registration notices themselves”), ¶ 14 (again relying on Marvel’s relevant copyright registrations and documenting them as Exhibit 1 to its Complaint); Ex. 1 (reflecting alleged recordation of copyright registrations with the United States Copyright Office); Dkt. 71 (Declaration of Molly Lens) ¶ 25 (attaching as composite Exhibit 24 the copyright registrations and renewal registrations relevant to Ditko’s works (Dkt. 71-20 to 71-32) wherein Marvel’s renewal registrations represent to the United States Copyright Office that the respective shell companies were the legal “authors” of the works as “works made for hire.” *See also* Toberoff Decl., Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that Martin Goodman (“Goodman”) registered the copyright to comic books under the names of various different shell corporations that were unrelated to each other and had no employees, offices, or business activities, and had no contact with any freelancer); Ex. 6 at 200:2-24 (Thomas testifying that he was hired by Magazine Management in 1965); Ex. 17 at 317:18-318:18 (Thomas testifying that Goodman ran “Marvel” as a bunch of small companies rather than just as a unified Magazine Management for some unknown business or legal reasons); *id.* at 244:15-23, 278:20-279:20 (Thomas testifying that the door to “Marvel’s” office in 1965 only said “Magazine Management” and that “Marvel’s” employees worked in Magazine Management’s offices); *id.* at 318:4-322:14 (Thomas testifying that Vista, Atlas, Non-Pareil, and others were just used as names on the comic book cover copyright indicia, but other than the indicia, no one knew what those entities did); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from



them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 20 at 196:1-12 (Evanier testifying that Sol Brodsky (“Brodsky”) described Goodman’s shell companies as “shell companies”); Ex. 24 at 49:21-50:22, 51:19-52:2 (Levitz testifying that Vista was one of Goodman’s shell companies and that the shell companies had no actual offices and that only Magazine Management had offices); Ex. 46 at 1-3 (list of Goodman’s shell companies dated October 4, 1967 showing no legal or corporate relationship to one another or to Magazine Management); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material from 1962 to 1966 (the “Period”)); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or the other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management).

**Ditko in the Period sold his freelance material to Magazine Management and thereby significantly contributed to its comic books, but Ditko was also selling and contributing his freelance material to other publishers, including Charlton Comics, at the same time, as was his right.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. describing Ditko’s common practice of selling freelance work to various publishers during the Period); Ex. 12 ¶ 18 (Evanier attesting that Ditko was submitting freelance *Spider-Man* material to Marvel but was also selling work to Charlton Comics at the same time); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko

writing about creating material for Charlton Comics and DC Comics); Ex. 61 (Ditko contributes to Charlton Comics' *Space Adventures* No. 27 (1959)); Ex. 65 (Ditko contributes to Charlton Comics' *Out of this World* No. 7 (1958)); Ex. 67 (Ditko contributes to Charlton Comics' *Strange Suspense* No. 32 (1957)); Ex. 75 (Ditko contributes to Charlton Comics' *Strange Suspense Stories* No. 33, *Director of the Board* (1957)); Ex. 77 (Ditko contributes to Charlton Comics' *Strange Suspense Stories* No. 48 (1960)); Ex. 79, "All Those Eyes" at 1-3 (Ditko contributes to Charlton Comics' *Out of this World* No. 6 (1957));

3. **Marvel's Statement:** Between 1962 and 1965 (the "Time Period"),<sup>1</sup> Ditko contributed to the creation of many comic book stories and characters appearing in Marvel comic books published during the Time Period, including the Works. Lens Decl., Ex. 63.

**RESPONSE: Counterclaimant disputes the use of the phrase "*Marvel comic books*" (emphasis added) as Ditko was only ever paid by Magazine Management and the comic book stories to which Ditko contributed were published by various corporately unrelated shell companies (e.g., Vista, Atlas, Non-Pareil), and were not published nor paid for by "Marvel" and the copyrights to the comic books were registered in the United States Copyright Office in the name of such independent shell companies and thereafter renewed in the United States Copyright Office as "works made for hire" of the respective shell companies. See Dkt. 71 (Declaration of Molly Lens) ¶ 25 (attaching as composite Exhibit 24 the copyright registrations and renewal registrations relevant to Ditko's works (Dkt. 71-20 to 71-32) wherein Marvel's renewal registrations represent to the United States Copyright Office that the**

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<sup>1</sup> Unless otherwise stated, all factual statements herein relate to the Time Period only. Note that due to a lag between when contributions were made and when a comic book was ultimately published, some Works were published in 1966 even though Ditko stopped working for Marvel in late 1965. See Thomas Decl. ¶ 18.

respective shell companies were the legal “authors” of the works as “works made for hire.”; Toberoff Decl., Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that Goodman registered the copyright to comic books under the names of various shell corporations that were unrelated to each other and that the shell companies had no employees, offices, or business activities, and had no contact with any freelancer); Ex. 17 at 317:18-318:18 (Thomas testifying that Goodman ran “Marvel” as a bunch of small companies rather than just as a unified Magazine Management for some unknown business or legal reasons); *id.* at 244:15-23, 278:20-279:20 (Thomas testifying that the door to “Marvel’s” office in 1965 only said “Magazine Management” and “Marvel’s” employees worked in Magazine Management’s offices); *id.* at 318:4-322:14 (Thomas testifying that Vista, Atlas, Non-Pareil, and others were just used as names on the comic book cover copyright indicia, but other than the indicia, no one knew what those entities did); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); *id.* at 138:3-139:2 (Thomas testifying that Magazine Management was the only payor of staff/freelancer checks); Ex. 20 at 196:1-12 (Evanier testifying that Brodsky described Goodman’s shell companies as “shell companies”); Ex. 24 at 49:21-50:22, 51:19-52:2 (Levitz testifying that Vista was one of Goodman’s shell companies and that Goodman’s shell companies had no actual offices and that only Magazine Management had offices); Ex. 46 at 1-3 (list of Goodman’s shell companies dated October 4, 1967 showing no legal or corporate relationship to one another or Magazine Management); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with,

Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck's payment records identifying "Magazine Management" as the only entity that paid him for his freelance material from 1962 to 1966); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management and that he thought the name on the checks was Marvel or Magazine Management); Ex. 6 at 200:2-24 (Thomas testifying that he was hired by Magazine Management in 1965); Ex. 40 at 2021MARVEL-0005845 (Certificate of Renewal Registration of *Amazing Fantasy* Vol. 1, No. 15, the issue in which Spider-Man originally appeared, dated November 20, 1990, claiming "Atlas Magazines, Inc." as the original author and copyright claimant); Ex. 41 at 2021MARVEL-0005849 (Certificate of Renewal Registration of *Amazing Spider-Man* Vol. 1, No. 1 dated November 20, 1990, claiming "Non-Pareil Publishing Corporation" as the original author and copyright claimant); Ex. 42 (Certificate of Renewal Registration of *Strange Tales* Vol. 1, No. 110, the issue in which Dr. Strange first appeared, dated December 27, 1991, claiming "Vista Publications, Inc." as the original author and copyright claimant).

**Counterclaimant further disputes that Ditko merely "*contributed* to the creation of many ... characters" (emphasis added), as, for example, and without limitation, Ditko solely originated the Dr. Strange character as early as 1946 and created the first five-page Dr. Strange story "on spec" which he then sold to Magazine Management and it was published in *Strange Tales* No. 110 (1963). In addition to co-creating Spider-Man, Ditko created a host of key supporting characters like the Chameleon, Electro, Aunt May, and Norman Osborn (the alter ego of the Green Goblin). Moreover, Ditko took over sole plotting and penciling both *Spider-Man* and *Dr. Strange* stories when Lee stopped speaking**

with Ditko later in the Period, and therefore solely originated and created—and did not merely “contribute[] to”—the new characters and new elements appearing in the stories he created during that time. See Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko’s Dr. Strange character in *Strange Tales* No. 110 (1963) and Lee’s admission that Ditko originated the idea and story for the Dr. Strange character); Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea, and I figgered [sic] we’d give it a chance”” in a contemporaneous letter dated January 9, 1963); Ex. 49 at 1 (first published appearance of Dr. Strange in *Strange Tales* No. 110); Ex. 33 (Ditko’s letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an initial sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko’s early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived in Johnstown, PA at the address written on the letter envelope of composite Ex. 33, and that in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: “Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it’s full of unexpected surprises!”); Ex. 72 at 225 (*Strange Tales* No. 135: “Plotted and Illustrated by Fandom’s Favorite Fiend: Steve Ditko”); Ex. 7 at 223:18-224:13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories

while Ditko and Lee were no longer speaking to each other in the Period); Ex. 17 at 29:19-30:8, 83:13-18 (Thomas testifying that by the time Thomas began at Marvel in mid-1965, Ditko was plotting and penciling *Dr. Strange* stories, which Thomas would dialogue); *id.* at 92:9-20 (Thomas testifying that Ditko stopped working with Marvel around Christmas 1965); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue to the balloons); Ex. 35 at DITKO-0193 (Ditko writing that he and Lee stopped speaking around 1964 and thus from then on, Ditko had complete creative control of the *Spider-Man* and *Dr. Strange* stories, which he was plotting and penciling until he left in 1966); Ex. 62 at 4-5 (Dr. Strange used his hands to cast teleportation and other spells in *Strange Tales* No. 139 (1965)); Ex. 63 at 2 (same in *Strange Tales* No. 126 (1964)); Ex. 70 at 8-9 (same in *Strange Tales* No. 129 (1965)); *compare* Ex. 61 at 3 (Ditko's character used his hands to cast spells in 1959 in Charlton Comics' *Space Adventures* No. 27); *see also* Ex. 66 at 10 (in *Strange Tales* No. 137 (1965), Dr. Strange used a device—the Eye of Agamotto—to transport through space and time); *compare* Ex. 65 at 4-5 (In Charlton Comics' *Out of this World* No. 7 (1958), Ditko's character used similar artifact to transport characters in a swirl of visual effects through space and time); *see also* Ex. 68 at 4-5 (in *Strange Tales* No. 122 (1964), Dr. Strange traversed through different dimensions and journeyed through alternate planes of existence); Ex. 69 at 1 (same in *Strange Tales* No. 134 (1965)); *compare* Ex. 67 at Cover, 4-5 (Ditko used same effect in Charlton Comics' *Strange Suspense* No. 32 (1957)); *see also* Ex. 73 at 6 (Norman Osborn's first appearance in the *Spider-Man* series in 1965); Ex. 74 at 10 (Norman Osborn's identity revealed to readers in *Amazing Spider-Man* No. 37 (1966)); *compare* Ex. 75 at 1-2 (Norman Osborn's precursor—including corporate villainy and distinct curled hairstyle—in 1957 in Ditko's story published in Charlton Comics' *Strange Suspense Stories* No. 33, *Director of the*

*Board*); *see also* Ex. 60 at 2, 8 (*Amazing Fantasy* No. 15 (1962), the issue in which Spider-Man and Ditko's Aunt May character first appeared) *compare* Ex. 79, "All Those Eyes" at 1-3 (Aunt May's forerunner character appeared in Ditko's story in Charlton Comics' *Out of this World* No. 6 (1957)); *see also* Ex. 76 at 1, 4 (Ditko's Electro character in *Amazing Spider-Man* No. 9 (1964)); *compare* Ex. 77 at 1, 4-5 (Ditko's electrically powered man, the predecessor of Electro, first appeared in Ditko's story published in Charlton Comics' *Strange Suspense Stories* No. 48 (1960)); *see also* Ex. 78 at 1, 5-6, 8-9 (Ditko introduces the Chameleon—a character who used various masks to carry out his villainy—in *Amazing Spider-Man* No. 1 (1963)); *compare* Ex. 79, "All Those Eyes" at 2-3 (Chameleon precursor—a spy character who used various masks in his espionage with a similar back story as the Chameleon—appeared in Ditko's "All Those Eyes" story he sold to Charlton Comics in 1957); Ex. 82 (Lee explaining in January 9, 1966 published interview: **"I don't plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I'll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he's the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next,** but it's interesting to work that way.") (emphasis added); Ex. 83 at 7 (same).

4. **Marvel's Statement:** Following his June 29, 2018 death, Ditko's brother Defendant Patrick S. Ditko was appointed administrator of his estate.<sup>2</sup> Lens Decl., Ex. 67 at 2; Lens Decl., Ex. 66; Lens Decl., Ex. 62 ¶ 6.

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<sup>2</sup> Unless otherwise noted, all references to "Ditko" herein shall refer to Steve Ditko and Defendant Patrick S. Ditko shall be referred to as "Defendant."

**RESPONSE: Admitted.**

5. **Marvel's Statement:** Marvel filed copyright registrations for each of the Works with the U.S. Copyright Office in the name of the Marvel entity that published the work. Lens Decl., Ex. 24A-E.

**RESPONSE: Admitted that copyright registrations were filed with the U.S. Copyright Office for the published comic books containing Ditko's works, but disputing that "Marvel" filed these copyright registrations in the Period and noting that the copyrights registrations were filed in the name of independent shell corporations. See** Toberoff Decl. Ex. 40 at 2021MARVEL-0005848; Ex 41 at 2021MARVEL-0005852; Ex. 42 at 2021MARVEL-0006420; Dkt. 71 (Declaration of Molly Lens) ¶ 25 (attaching as composite Exhibit 24 the copyright registrations and renewal registrations relevant to Ditko's works (Dkt. 71-20 to 71-32)).

6. **Marvel's Statement:** Marvel subsequently filed renewal copyright registrations for each of the Works, with each such renewal listing a Marvel entity as the renewal claimant and proprietor of the copyright in the subject work as a work made for hire. Lens Decl., Ex. 24A-E.

**RESPONSE: Admitted that copyright renewal registrations were filed with the U.S. Copyright Office listed Marvel Entertainment Group, Inc. as the renewal claimant regarding the published comic books containing Ditko's works, but disputing with respect to Ditko's works Marvel's retroactive mischaracterization in the renewal registrations that the comic books were "work made for hire" for various shell companies and listing such shell companies as the legal "authors" thereof. See** Dkt. 71 (Declaration of Molly Lens) ¶ 25 (attaching as composite Exhibit 24 the copyright registrations and renewal registrations relevant



to Ditko's works (Dkt. 71-20 to 71-32) wherein Marvel's renewal registrations represent to the United States Copyright Office that the respective shell companies were the legal "authors" of the works as "works made for hire."; Toberoff Decl., Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that Goodman registered the copyright to comic books under the names of various shell corporations that were unrelated to each other and that the shell companies had no employees, offices, or business activities, and had no contact with any freelancer); Ex. 17 at 317:18-318:18 (Thomas testifying that Goodman ran "Marvel" as a bunch of small companies rather than just as a unified Magazine Management for some unknown business or legal reasons); *id.* at 244:15-23, 278:20-279:20 (Thomas testifying that the door to "Marvel's" office in 1965 only said "Magazine Management" and "Marvel's" employees worked in Magazine Management's offices); *id.* at 318:4-322:14 (Thomas testifying that Vista, Atlas, Non-Pareil, and others were just used as names on the comic book cover copyright indicia, but other than the indicia, no one knew what those entities did); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or "of [them] having any existence" whatsoever); *id.* at 138:3-139:2 (Thomas testifying that Magazine Management was the only payor of staff/freelancer checks); Ex. 20 at 196:1-12 (Evanier testifying that Brodsky described Goodman's shell companies as "shell companies"); Ex. 24 at 49:21-50:22, 51:19-52:2 (Levitz testifying that Vista was one of Goodman's shell companies and that Goodman's shell companies had no actual offices and that only Magazine Management had offices); Ex. 46 at 1-3 (list of Goodman's shell companies dated October 4, 1967 showing no legal or corporate relationship to one another or Magazine Management); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista

or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck's payment records identifying "Magazine Management" as the only entity that paid him for his freelance material from 1962 to 1966); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management and that he thought the name on the checks was Marvel or Magazine Management); Ex. 6 at 200:2-24 (Thomas testifying that he was hired by Magazine Management in 1965); Ex. 40 at 2021MARVEL-0005845 (Certificate of Renewal Registration of *Amazing Fantasy* Vol. 1, No. 15, the issue in which Spider-Man originally appeared, dated November 20, 1990, claiming "Atlas Magazines, Inc." as the original author and copyright claimant); Ex. 41 at 2021MARVEL-0005849 (Certificate of Renewal Registration of *Amazing Spider-Man* Vol. 1, No. 1 dated November 20, 1990, claiming "Non-Pareil Publishing Corporation" as the original author and copyright claimant); Ex. 42 (Certificate of Renewal Registration of *Strange Tales* Vol. 1, No. 110, the issue in which Dr. Strange first appeared, dated December 27, 1991, claiming "Vista Publications, Inc." as the original author and copyright claimant).

7. **Marvel's Statement:** MCI acquired copyright title for the Works from Marvel through a series of copyright assignments. Bard Decl., Ex. 10; Bard Decl., Ex. 11; Bard Decl., Ex. 12; Bard Decl., Ex. 13; Bard Decl., Ex. 16.

**RESPONSE:** Counterclaimant admits that Marvel has presented a series of copyright assignments with the last one being to MCI but denies that each clearly specifies that the copyrights to the Works are being assigned. Bard Decl., Ex. 10; Ex. 11; Ex. 12; Ex. 13; Ex. 16.

8. **Marvel’s Statement:** Between June 1 and July 16, 2021, Defendant served four notices on MCI, The Walt Disney Company, and other entities purporting to terminate alleged assignments of the copyrights in the Works (the “Termination Notices”). Lens Decl., Ex. 63; Lens Decl., Ex. 62 ¶ 15.

**RESPONSE:** Counterclaimant disputes Marvel’s use of “*purporting to terminate*” and “*alleged assignments*” (emphasis added), but otherwise, admitted.

9. **Marvel’s Statement:** Martin Goodman was Marvel’s publisher from 1939 until 1972. Bard Decl., Ex. 7 at 5; Lens Decl., Ex. 2 18:10-13; Lens Decl., Ex. 2 81:10-12; Lens Decl., Ex. 7 219:11-220:11; Lens Decl., Ex. 12 60:22-61:4; Lens Decl., Ex. 13 11:18-23; Lens Decl., Ex. 13 16:14-19; Lens Decl., Ex. 15 12:19-21; Lens Decl., Ex. 4 99:6-10; Lens Decl., Ex. 2 32:8-12.

**RESPONSE:** Counterclaimant disputes that Goodman was “Marvel’s” publisher from 1939 until 1972 but admits that Goodman was the publisher of Timely Comics, and then, during the Period, of Magazine Management. There is no evidence that Goodman served as the publisher for any of the shell companies, including Vista, Atlas, and Non-Pareil, which existed only on paper and had no actual publishing or other business operations. See Toberoff Decl., Ex. 1 at 8 (Evanier Rep. providing historical context and describing Goodman’s founding of Timely); Ex. 4 at 11:24-12:3 (Lee testifying that Timely changed names many times); Ex. 56 at 82:23-83:13 (Lee testifying he started working at Timely, which was somehow related to Magazine Management); Ex. 11 ¶ 4 (Colan attesting that he was originally hired in 1946 as a staff artist for Timely, which became Atlas); Ex. 17 at 34:21-35:25 (Thomas testifying that Goodman kept changing names of his companies and the public was confused as to what the name of “Marvel” actually was. The company started as “Timely,” but

that “Atlas,” which was Goodman’s distributing company, had its name on the magazines, which made the public think the company’s name was “Atlas.” Finally, “Marvel” began being sporadically used sometime between 1961 to 1963.); Ex. 14 at 4 (Evanier Rebuttal Rep. providing historical context and explaining that Goodman registered the copyright to comic books under the names of various shell corporations that were unrelated to each other); Ex. 17 at 317:18-318:18 (Thomas testifying that Goodman ran “Marvel” as a bunch of small companies rather than just as a unified Magazine Management for some unknown business or legal reasons); Ex. 20 at 196:1-12 (Evanier testifying that Brodsky described Goodman’s shell companies as “shell companies”); Ex. 24 at 49:21-50:22 (Levitz testifying that Vista was one of Goodman’s shell companies); Ex. 46 at 1-3 (list of Goodman’s shell companies dated October 4, 1967 showing no legal or corporate relationship to one another or to Magazine Management).

10. **Marvel’s Statement:** Stan Lee was Marvel’s editor (a/k/a editor-in-chief) from approximately 1942 until 1972—when he was promoted to president and publisher of Marvel. Lee also wrote stories for Marvel on a freelance basis, including during the Time Period. Lens Decl., Ex. 13 14:2-17; Lens Decl., Ex. 6 7:18-8:10; Lens Decl., Ex. 6 12:1-4; Lens Decl., Ex. 15 11:21-13:10; Lens Decl., Ex. 2 32:8-12; Lens Decl., Ex. 6 40:14-20; Lens Decl., Ex. 15 17:2-8; Lens Decl., Ex. 5 63:1-18; Lens Decl., Ex. 2 290:17-291:5; *see also* Lens Decl., Ex. 22 at 3; Lens Decl., Ex. 74 at 3.

**RESPONSE:** Counterclaimant disputes that Lee was editor of “Marvel” from 1942 to 1972, as Lee originally worked for Timely and then, in the Period, was employed as an editor by Magazine Management. *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. describing Lee’s role as an office boy at Timely); Ex. 4 at 10:23-11:17 (Lee testifying that he got hired at Timely

in 1939 or 1940); Ex. 56 at 82:13-22 (Lee testifying he started at Timely around 1940 when he was 17 years old).

**Counterclaimant disputes that Lee wrote stories for “Marvel.” In the Period, Lee principally wrote the dialogue and captions for comic book stories in a freelance capacity and was paid by the page for such freelance material by Magazine Management in the Period.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee’s common practice of composing dialogue as a freelancer, not as Marvel’s editor and doing his freelancing from home two of the five workdays per week, for which he was paid on a per-page basis as a freelancer); Ex. 4 at 17:17-25 (Lee testifying that he was paid as a freelancer for his writing and was on salary for his work as an editor); Ex. 55 at 62:18-63:18 (Lee testifying that he got paid a salary as editor and was paid separately for his writing); Ex. 56 at 91:20-92:6 (Lee testifying that he got paid a salary as editor and separately as a freelancer pre page for his writing); Ex. 17 at 138:3-139:2 (Thomas testifying that Magazine Management was the only payor of staff salaries and freelancer checks); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period).

11. **Marvel’s Statement:** Roy Thomas joined Marvel in 1965 as a staff writer, quickly transitioned to working as an editorial assistant to Stan Lee, was promoted to assistant editor in approximately 1967, and was promoted to editor-in-chief from 1972 to 1974. Thomas also wrote stories for Marvel on a freelance basis, including during the Time Period. Lens Decl.,

Ex. 2 271:11-272:19; Lens Decl., Ex. 16 99:6-11; Lens Decl., Ex. 2 26:11-27:22; Lens Decl., Ex. 2 61:7-15; Lens Decl., Ex. 2 64:17-25; Lens Decl., Ex. 21.

**RESPONSE: Admitted, except that Roy Thomas was employed by Magazine Management in 1965 at the tail end of the relevant Period and, though on a staff salary, wrote and sold stories to Magazine Management by the page on a purely freelance basis.** See Toberoff Decl. Ex. 6 at 200:2-24 (Thomas testifying that he was hired by Magazine Management in 1965); Ex. 17 at 138:3-139:2 (Thomas testifying that Magazine Management was the only payor of staff salaries and freelance checks); *id.* at 244:15-23, 278:20-279:20 (Thomas testifying that the door to “Marvel’s” office in 1965 only said “Magazine Management”); Ex. 44 ¶ 3(a) (Marvel’s contract with Thomas dated September 1, 1974 providing that any writing Thomas did would be on a purely freelance basis for which he would be paid for only for those pages which Marvel accepted in its sole discretion and requiring Thomas to make changes to his freelance work for no additional compensation); Ex. 53 ¶ 3(a) (Marvel’s contract with Thomas dated August 27, 1976 with same provision).

12. **Marvel’s Statement:** During Stan Lee’s tenure as editor, Marvel developed what became known as the Marvel Method for creating comic book stories. Lens Decl., Ex. 13 20:11-21:25; Lens Decl., Ex. 11 218:14-219:16; Lens Decl., Ex. 9 at 47:20-48:8.

**RESPONSE: Counterclaimant admits that Lee often utilized what he called the “Marvel Method,” wherein the artist would create and plot the comic book stories, to which Lee would later add dialogue, but denies that Ditko created his material pursuant to the “Marvel’s” or Lee’s “method,” as Ditko was extremely independent and often took control of his stories that he sold to Marvel.** See Toberoff Decl. Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange*

stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); *id.* at 262:4-264:19 (Thomas testifying that, when Thomas began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko, on his own, plotted and drew *Spider-Man* for more than one year before he left in 1966, did not work pursuant to the Marvel Method, and that Lee would not even know anything about the story until it was penciled and submitted by Ditko); *id.* at 84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: “Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it’s full of unexpected surprises!”); Ex. 72 at 225 (*Strange Tales* No. 135: “Plotted and Illustrated by Fandom’s Favorite Fiend: Steve Ditko”); Ex. 18 (1965 example of Ditko’s *Dr. Strange* margin notes for Thomas); Ex. 19 at 6-8 (Thomas interview explaining that Ditko and Lee were not speaking in 1965 and Ditko was plotting both *Spider-Man* and *Dr. Strange* and would only come to the office to drop work off with Brodsky); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 28 (Lee writing that Ditko was the co-creator of *Spider-Man* and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and some captions).

13. **Marvel’s Statement:** Under the Marvel Method, Stan Lee generally originated characters and plot ideas for Marvel comics. Lens Decl., Ex. 48 at 2 (Ditko admitting that “Stan provided the plot ideas”); Lens Decl., Ex. 2 48:2-22 (Thomas affirming prior statements that “Stan was really the guy who generated the ideas” and that he did not “push[] us to come up with new characters in the early days, except for villains”); Lens Decl., Ex. 3 97:8-98:25 (Marvel writer Larry Lieber (and defendant in consolidated action) testifying that “Stan would give me a one-page plot outline for a story, I would write the script, [and] return it Stan”); Lens Decl., Ex. 9 13:22-14:4 (Lieber confirming that Stan Lee “came up with the ideas for the characters that would be in the story”); Lens Decl., Ex. 9 12:19-13:5 (Lieber testifying that “my brother [Stan Lee] made up the plot and gave me a synopsis” and that “all” story ideas “came from Stan Lee”); Lens Decl., Ex. 13 35:5-10 (Lee confirming that his “role” was “to come up with the idea” for new comic books or stories); Lens Decl., Ex. 13 35:23-36:6 (Lee testifying that “[i]n the 60s, the ideas for the new characters originated with [him] because that was [his] responsibility.”); Lens Decl., Ex. 71 at 3:25-6:09 (Lee explaining how Marvel’s basic “formula” was to “mix fantasy with realism” with characters that “are a little different, . . . sort of like continuing soap operas”); Lens Decl., Ex. 71 at 3:25-6:09 (Lee explaining how Marvel “juxtapos[ed] . . . bigger-than-life problem[s]” with “the very simple home life and family life”); Lens Decl., Ex. 71 at 20:17-23:23 (Lee explaining how Marvel “juxtapos[ed] [] the supernatural with the very mundane, every day type of existence”); *see also* Lens Decl., Ex. 10 335:10-336:11; Lens Decl., Ex. 38 at 5; Lens Decl., Ex. 43 at 2.

**RESPONSE:** Counterclaimant admits that Lee often utilized what he called the “Marvel Method,” wherein the artist would create and plot the comic book stories, to which Lee would later add dialogue, but disputes that Lee “generally originated the



**characters and plot ideas” and denies that Ditko created his material pursuant to the “Marvel’s” or Lee’s “method,” as Ditko was extremely independent and often took control of his stories that he sold to Marvel. See Toberoff Decl. Ex. 7 at 223:18-225:20, 277:11-13** (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); *id.* at 262:4-264:19 (Thomas testifying that, when Thomas began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko, on his own, plotted and drew *Spider-Man* for more than one year before he left in 1966, did not work pursuant to the Marvel Method, and that Lee would not even know anything about the story until it was penciled and submitted by Ditko); *id.* at 84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); Ex. 18 (1965 example of Ditko’s *Dr. Strange* margin notes for Thomas); Ex. 19 at 6-8 (Thomas interview explaining that Ditko and Lee were not speaking in 1965 and Ditko was plotting both *Spider-Man* and *Dr. Strange* and would only come to the office to drop work off with Brodsky); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 28 (Lee writing that Ditko was the co-creator of *Spider-Man* and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and some captions); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: “Sturdy Stevey Ditko

dreamed up the plot of this tantalizing tale, and it's full of unexpected surprises!"); Ex. 72 at 225 (*Strange Tales* No. 135: "Plotted and Illustrated by Fandom's Favorite Fiend: Steve Ditko"); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee's *Spider-Man* story ideas and characters such as, for instance, Lee's idea for a Spider-Woman character, or Lee's idea of making Aunt May more glamorous); Ex. 58 at 4 (Ditko writing that he "refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it").

14. **Marvel's Statement:** After Lee conceived of a story idea, Lee then assigned a pencil artist ("penciller") to the comic and generally provided a "plot" or "synopsis" outlining the key elements of the story he wanted the penciller to draw. Lens Decl., Ex. 48 at 2 (Ditko admitting that "Stan provided the plot ideas"); Lens Decl., Ex. 46 at 3 (Ditko explaining that Stan Lee "create[ed]" the "Spider-Man" name and wrote the original "synopsis for the artist [(i.e., Ditko)]"); Lens Decl., Ex. 13 20:11-21:25 (Lee testifying about the Marvel Method and, using Ditko as an example, explaining that he might say: "Look, Steve, I don't have time to write your script for you, but this is the idea for the story. I'd like this fill in, and I'd like this to happen, and in the end the hero ends by doing this. You go ahead and draw it any way you want to, as long as you keep to that main theme. . . . And when you finish drawing this one, I will put in all the dialogue and the captions."); Lens Decl., Ex. 11 218:14-219:16 (Thomas testifying that, under the Marvel Method, Stan Lee "would come up with the idea for the plots . . . [a]nd he simply would give those plots to the artists, who would then draw the story, break them down into pictures, expanding them, whatever needed to be done to break them down into pictures"); *see also* Lens Decl., Ex. 2 28:8-21; Lens Decl., Ex. 9 at 47:20-48:8; Lens Decl., Ex. 69; Lens Decl., Ex. 70.

**RESPONSE:** Counterclaimant admits that Lee often utilized what he called the “Marvel Method,” wherein the artist would create and plot the comic book stories, to which Lee would later add dialogue, but denies that Ditko created his material pursuant to the “Marvel’s” or Lee’s “method,” as Ditko was extremely independent and often took control of his stories, rejecting any of Lee’s “ideas” he did not like. *See* Toberoff Decl. Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); *id.* at 262:4-264:19 (Thomas testifying that, when Thomas began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko, on his own, plotted and drew *Spider-Man* for more than one year before he left in 1966, did not work pursuant to the Marvel Method, and that Lee would not even know anything about the story until it was penciled and submitted by Ditko); *id.* at 84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); Ex. 18 (1965 example of Ditko’s *Dr. Strange* margin notes for Thomas); Ex. 19 at 6-8 (Thomas interview explaining that Ditko and Lee were not speaking in 1965 and Ditko was plotting both *Spider-Man* and *Dr. Strange* and would only come to the office to drop work off with Brodsky); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 28 (Lee writing

that Ditko was the co-creator of Spider-Man and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and some captions); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: “Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it’s full of unexpected surprises!”); Ex. 72 at 225 (*Strange Tales* No. 135: “Plotted and Illustrated by Fandom’s Favorite Fiend: Steve Ditko”); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee’s *Spider-Man* story ideas and characters such as, for instance, Lee’s idea for a Spider-Woman character, or Lee’s idea of making Aunt May more glamorous); Ex. 58 at 4 (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”); Ex. 1 at 12 (Evanier Rep. describing Ditko’s regular practice of maintaining a chart mapping out the future development of a character so he could introduce elements into current issues and then use those elements in issues many months down the line); Ex. 35 at DITKO-0193 (Ditko writing that he planted seeds of subplots in stories that would work their way through the issues until it was time for those subplots to play an active role later when the time was right); Ex. 58 at 3 (Ditko writing when he took over the *Spider-Man* stories he “knew in advance the [*Spider-Man*] story line like the best (worst) time for Aunt May to have a heart attack”); Ex. 82 (Lee explaining in January 9, 1966 published interview: “**I don’t plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I’ll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he’s the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won’t let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he’ll come up with next,** but it’s interesting to work that way.”) (emphasis added); Ex. 83 at 7 (same).

**Counterclaimant also denies that Lee “assigned” Ditko tasks to the extent this connotes that Ditko was under any legal obligation to perform work or to do what Lee or Magazine Management proposed. Ditko was not employed or hired by Magazine Management (or by any other alleged Marvel predecessor), Ditko was not under contract with any such entities and there were no bilateral legal obligations between Ditko and any such entities; thus Lee could not “assign” Ditko to perform anything in any legal or employment sense.** Marvel has not produced any contemporaneous agreement with Ditko from the Period for his creative services, nor any other evidence reflecting any bilateral rights and obligations between Ditko and Magazine Management (nor any other alleged Marvel predecessor) in the Period, nor has Marvel alleged that any such agreement or bilateral legal rights and obligations existed between such parties in the Period. *See* Toberoff Decl. Ex. 1 at 10, 13 (Supplemented Expert Report of Mark Evanier (“Evanier Rep.”) providing historical context giving rise to Marvel’s use of freelance creators and explaining that, when Magazine Management ran out of surplus artwork to publish, it began to purchase artwork and scripts from freelancers at a low page rate and that freelancers did not have written contracts with Magazine Management during the 1950s or 1960s and describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 14 at 10-11 (Rebuttal Expert Report of Mark Evanier (“Evanier Rebuttal Rep.”) explaining that it was not the custom and practice of Marvel or other publishers in the comic book industry to have written contracts with freelance creators during the Period); Ex. 2 at 71:17-74:5 (Larry Lieber (“Lieber”) testifying that he sold freelance work to Marvel in the 1950s and 1960s, had no contract with Marvel, and that Marvel was not obligated to buy his submitted freelance material); Ex. 3 at 159:24-160:4, 194:11-195:3, 207:12-22, 211:7-212:3 (John V.

Romita (“Romita”) testifying that he did not have a contract with Marvel as a freelancer and that freelancers were free to sell work to other publishers); Ex. 5 at 371:3-25 (Stan Lee (“Lee”) testifying that Marvel “would only buy what [it] needed”); Ex. 6 at 36:17-21, 202:2-20 (Roy Thomas (“Thomas”) testifying that he had no contract with Marvel until 1974); Ex. 8 ¶ 10 (Joe Sinnott (“Sinnott”) attesting that he had no contract with Marvel and Marvel was very small and disorganized in the 1950s and 1960s); Ex. 8 ¶ 11 (Sinnott attesting that Marvel had no obligation to buy pages of his work and that Marvel paid only for the pages it wanted); Ex. 9 ¶ 8 (James Steranko (“Steranko”) Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 10 ¶ 12 (Richard Ayers (“Ayers”) attesting that he had no contract with Marvel from 1959 to 1975); Ex. 11 ¶ 9 (Gene Colan (“Colan”) attesting that he had no contract with Marvel until 1975); Ex. 13 ¶ 5-7 (Neal Adams (“Adams”) attesting that he had no contract with Marvel in the 1960s or 1970s and that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 17 at 39:25-40:4, 51:20-52:4, 298:8-14, 301:14-303:7 (Thomas testifying that he had no written contract from 1965 to 1974 and that Marvel did not have contracts with freelancers prohibiting them from selling work to other publishers); Ex. 22 at 287:22-288:12 (Lieber testifying that he had no contract with Marvel in the 1950s or 1960s); Ex. 24 at 79:2-8 (Paul Levitz (“Levitz”) testifying that Marvel did not have contracts with any freelancer until the mid-1970s); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics).

15. **Marvel’s Statement:** Once the penciller turned in his work, Lee would review the artwork and consider any changes, additions, or corrections. Lens Decl., Ex. 48 at 2 (Ditko

describing the process of Stan Lee reviewing his work); Lens Decl., Ex. 13 20:11-21:25 (Lee testifying about the Marvel Method); Lens Decl., Ex. 11 218:14-219:16 (Thomas explaining the Marvel Method).

**RESPONSE: Counterclaimant admits that Lee would often review artwork submitted by freelancers prior to Magazine Management deciding whether to purchasing it by the page, and at times would request changes to pages as a condition to purchasing such pages. Counterclaimant denies that Ditko would make such changes, as Ditko often refused to alter his work, and in that event, any changes Lee wanted were either ignored, or had to be made by a production assistant after Ditko had sold his work to the company. See** Toberoff Decl. Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko’s practice of refusing to make changes and in such case, Marvel’s custom of having staff make such changes after the work had been submitted to and purchased by Marvel); Ex. 3 at 75:18-20, 243:13-244:23, 246:5-9 (Romita testifying that he, or someone else Lee could find in the Marvel office, would be asked to make changes to other artists’ work after it had been submitted and would not be paid any extra for making these changes and noting specifically that when Lee did not like something on a Ditko cover, he asked Kirby to change it); Ex. 19 at 6, “Legends at Loggerheads!” (Thomas explaining example of when Lee incorrectly dialogued a *Spider-Man* story in a way Ditko had not intended, Ditko refused to accede to Lee’s chosen direction); Ex. 35 at DITKO-0193 (Ditko writing that he ignored comments from Lee and Brodsky and only made changes to stories when he agreed with them); Ex. 21 at 41:7-18 (Steranko testifying that Marvel had production assistants to make changes to work after it had been submitted by artists).

**Counterclaimant further denies that Magazine Management would pay for any such changes requested (as a condition to purchasing the freelance pages in question), as it only**

**paid for the final page it decided to purchase from a freelancer in its sole discretion.** *See* Toberoff Decl. Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel’s custom and practice of not paying freelancers to revise or redraw a page, as freelancers were only paid for the final pages the publisher decided to accept and purchase); Ex. 14 at 7 (Evanier Rebuttal Rep. explaining the custom and practice in the comic book industry, including at Marvel, for publishers to not pay for rejected material, or to pay a freelancer to make revisions to his material); Ex. 2 at 102:15-105:17 (Lieber testifying he was not paid for redoing work and that he was only paid for the final pages Marvel accepted); Ex. 8 ¶ 13 (Sinnott attesting that Marvel only paid for the final pages that were sold to Marvel, not for any changes or rejected work); Ex. 9 ¶ 14 (Steranko attesting he was not compensated for having to redo any work); Ex. 10 ¶ 11 (Ayers attesting that he was not paid for rejected material or for having to redo material); Ex. 11 ¶¶ 9, 11 (Colan attesting that Marvel did not pay him for redoing work); Ex. 13 ¶¶ 10-11 (Adams attesting that he was only paid for pages Marvel accepted); Ex. 17 at 142:21-143:15, 296:10-25 (Thomas testifying that freelancers were not paid for having to redo or revise pages and that they would only be paid for the final, accepted page); Ex. 43 ¶ 3(a) (Marvel’s contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel’s contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel’s contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel’s October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber “will make all changes and rework all Material ...



without charge”); *compare* Ex. 47 ¶ 6 (unsigned Lancer Books contract with Don Rico dated December 15, 1966 with provision stating Lancer “shall be deemed the Author of the Work ... in view of the fact that [Rico was Lancer’s] employee for hire”).

16. **Marvel’s Statement:** Lee and the other Marvel editors would then direct the pages through the office, beginning with the addition of the writer’s dialogue and captions (typically written by Lee or Thomas). Lens Decl., Ex. 7 201:24-203:16 (Thomas testifying about the process of “trafficking [pages] through the office” at Marvel); Lens Decl., Ex. 2 135:8-14, 125:9-17 (similar); Lens Decl., Ex. 11 218:14-219:16 (Thomas testifying that, after artists turned in their penciled pages, Lee “would dialogue it, which means [adding] the dialogue and captions”); Lens Decl., Ex. 13 20:11-21:25 (Lee testifying to the same).

**RESPONSE: Counterclaimant admits that Lee or Thomas (after he commenced working at Magazine Management in 1965) would dialogue the balloons after Magazine Management had purchased Ditko’s pages, but denies that Lee (or later, Thomas) were the sole originators/writers of the dialogue, as Ditko would often write extensive margin notes, including suggested dialogue and captions, so that when Lee (or later, Thomas), dialogued Ditko’s story, they would know what story points Ditko intended in each panel and what the characters would likely say consistent with the story Ditko had plotted. See Toberoff Decl. Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko’s practice of submitting detailed notes with his freelance material to assist Lee in dialoguing the stories); Ex. 7 at 223:18-225:20 (Thomas testifying that Ditko refused to speak to Lee while working on *Spider-Man* and *Dr. Strange* so all plotting on the stories was done by Ditko, and further, that Ditko would provide margin notes to indicate what he intended to happen in the story to guide Lee when Lee dialogued the story); *id.* at 262:4-264:19 (Thomas testifying that when he began to dialogue *Dr.***

*Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 17 at 84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); Ex. 18 (1965 example of Ditko's *Dr. Strange* margin notes for Thomas); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue [in the balloons]); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: "Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it's full of unexpected surprises!"); Ex. 72 at 225 (*Strange Tales* No. 135: "Plotted and Illustrated by Fandom's Favorite Fiend: Steve Ditko").

17. **Marvel's Statement:** Marvel would send the pages to an inker, who would go over the penciled drawings in ink, and to a letterer, who would add the dialogue balloons and captions in ink. Lens Decl., Ex. 2 129:10-132:8; Lens Decl., Ex. 13 31:23-33:12.

**RESPONSE:** Admitted but Counterclaimant denies that this is relevant to the issue of whether Ditko created his material as "work made for hire" because these things transpired well after Ditko had created and submitted his material and after Ditko's work was accepted for publication and purchased by Magazine Management. Magazine Management's subsequent physical production, assemblage and publication of the resulting comic books is not what this case is about nor is it relevant to the "work for hire" issue here which focuses on *Ditko's* creation of *his material* only.

18. **Marvel's Statement:** After the lettering was finished, Marvel would proofread the pages and then provide them to a colorist to add color to the pages. Lens Decl., Ex. 2 132:9-133:10; Lens Decl., Ex. 2 134:9-135:7; Lens Decl., Ex. 13 31:23-33:12.

**RESPONSE:** Admitted but Counterclaimant denies that this is relevant to the issue of whether Ditko created his material as “work made for hire” because these things transpired well after Ditko had created and submitted his material and after Ditko’s work was accepted for publication and purchased by Magazine Management. Magazine Management’s subsequent physical production, assemblage and publication of the resulting comic books is not what this case is about nor is it relevant to the “work for hire” issue here which focuses on *Ditko’s* creation of *his material* only.

19. **Marvel's Statement:** Once the pages were colored, Marvel would send them to the printer to be printed for publication. Lens Decl., Ex. 13 31:23-33:12; Lens Decl., Ex. 10 384:22-385:11; Lens Decl., Ex. 13 42:10-20.

**RESPONSE:** Admitted, but Counterclaimant denies that this is relevant to the issue of whether Ditko created his material as “work made for hire” because these things transpired well after Ditko had created and submitted his material and after Ditko’s work was accepted for publication and purchased by Magazine Management. Magazine Management’s subsequent physical production, assemblage and publication of the resulting comic books is not what this case is about nor is it relevant to the “work for hire” issue here which focuses on *Ditko’s* creation of *his material* only.

20. **Marvel's Statement:** Marvel freelancers typically had no contact with other freelancers working on the same comic book, as it was Lee and other Marvel staff that coordinated this process, not the freelancers. Lens Decl., Ex. 57 at 3-4 (Ditko writing that

“[o]nce I turned in the inked pages, I never knew who edited them or what, how anything was changed, added—sound effects, etc. Who, why changes, different cover, etc. Once I did the job, turned it in, got paid, my involvement ended. It was all ancient history.”); Lens Decl., Ex. 3 141:8-13 (Lieber testifying that he could not recall “ever hav[ing] contact” with other contributors to a work after submitting his script); Lens Decl., Ex. 3 299:13-23 (Lieber explaining that he did not get to select the artists, letterers, or colorists for his scripts); Lens Decl., Ex. 3 300:4-18 (Lieber confirming that, after he turned in his work, he did not have “further communication or contact with anybody except, perhaps, with Stan” and that “[t]he next time [he] . . . knew anything about it is when it came out, you know, in the comic book form”); Lens Decl., Ex. 9 17:13-19 (Lieber testifying that he did not “have any contact with the story after [he] turned it in” and never “ha[d] discussions with the artists about the stories”).

**RESPONSE: Counterclaimant disputes specifically, that Ditko “typically had no contact with other freelancers working on the same comic book,” as Ditko would typically plot and draw the *Spider-Man* and *Dr. Strange* stories, and in addition, Ditko would provide detailed story notes as to what was happening on each page and suggest dialogue and captions, either in the margins or often written out separately, and then deliver those artwork pages and story notes to Lee (or later, Thomas) who, as *freelancers*, would dialogue and caption the stories Ditko had given them. In many instances, Ditko would then get the stories back from Lee (or later, Thomas), and ink his stories as well, correcting any of Lee’s dialoguing mistakes that did not align with Ditko’s story. See Toberoff Decl. Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko’s practice of submitting detailed notes with his freelance material to assist Lee in dialoguing the stories); Ex. 7 at 223:18-225:20 (Thomas testifying that Ditko refused to speak to Lee while working on *Spider-Man* and *Dr. Strange* so all**

plotting on the stories was done by Ditko, and further, that Ditko would provide margin notes to indicate what he intended to happen in the story to guide Lee when Lee dialogued the story); *id.* at 262:4-264:19 (Thomas testifying that when he began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 17 at 84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); Ex. 18 (1965 example of Ditko's *Dr. Strange* margin notes for Thomas); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 7 at 262:4-264:19 (Thomas testifying that, when Thomas began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 19 at 6, "Legends at Loggerheads!" (Thomas explaining example of when Lee incorrectly dialogued a *Spider-Man* story in a way Ditko had not intended, Ditko refused to accede to Lee's chosen direction, and corrected Lee's mistake when Ditko received the work to ink it); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: "Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it's full of unexpected surprises!"); Ex. 72 at 225 (*Strange Tales* No. 135: "Plotted and Illustrated by Fandom's Favorite Fiend: Steve Ditko"); Ex. 80 (Marvel paying Ditko for reprints of numerous comic book stories noting that the payments were for pencil (i.e., drawing the story panel by panel), plot (i.e., the story plot) and ink (i.e., inking the "pencilled" panels); 81 (same).

21. **Marvel’s Statement:** To keep comic book production on schedule, Marvel imposed deadlines on its freelance writers and artists. Lens Decl., Ex. 13 42:10-20 (Lee testifying that “[e]very strip had a deadline, because these books had to go out every month. And it was very important that the deadline be met. Because if a book was late, we had already paid the printer for that press time. And if the book wasn’t delivered in time, we still had to pay the printer. So it was a total loss to us. So the deadlines were very important. And the artists always knew this has to be delivered by thus-and-such a date.”); Lens Decl., Ex. 10 384:22-385:11 (Lee testifying that it was part of his job as editor-in-chief to set deadlines for the artists); Lens Decl., Ex. 72 at 4 (recalling Ditko toiling at his artist’s desk in the early 1960s “tortured by [] deadlines”); Lens Decl., Ex. 73 at 3 (Ditko noting that Kirby was “buried under work” and needed to work fast “to keep up with the assignments Lee was throwing at him”); *see also* Lens Decl., Ex. 4 94:6-21; Lens Decl., Ex. 2 154:9-155:25; Lens Decl., Ex. 2 333:8-16; Lens Decl., Ex. 12 59:22-60:21; Lens Decl., Ex. 7 218:2-16; Lens Decl., Ex. 3 266:11-12; Lens Decl., Ex. 3 125:5-13; Lens Decl., Ex. 9 14:9-25.

**RESPONSE:** Admitted that Magazine Management set deadlines in connection with the production of its comic books but denied that it could impose deadlines on Ditko in any legal or employment sense because the company intentionally did not employ or place Ditko under contract. The parties thus had no bilateral obligations to one another and, as such, neither Magazine Management nor its editors could “impose deadlines” on Ditko. Marvel has not produced any contemporaneous agreement with Ditko from the Period for his creative services, nor any other evidence reflecting any bilateral rights and obligations between Ditko and Magazine Management (nor any other alleged Marvel predecessor) in the Period, nor has Marvel alleged that any such agreement or bilateral legal rights and obligations existed

between such parties in the Period. *See* Toberoff Decl. Ex. 1 at 10, 13 (Supplemented Expert Report of Mark Evanier (“Evanier Rep.”) providing historical context giving rise to Marvel’s use of freelance creators and explaining that, when Magazine Management ran out of surplus artwork to publish, it began to purchase artwork and scripts from freelancers at a low page rate and that freelancers did not have written contracts with Magazine Management during the 1950s or 1960s and describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 14 at 10-11 (Rebuttal Expert Report of Mark Evanier (“Evanier Rebuttal Rep.”) explaining that it was not the custom and practice of Marvel or other publishers in the comic book industry to have written contracts with freelance creators during the Period); Ex. 2 at 71:17-74:5 (Larry Lieber (“Lieber”) testifying that he sold freelance work to Marvel in the 1950s and 1960s, had no contract with Marvel, and that Marvel was not obligated to buy his submitted freelance material); Ex. 3 at 159:24-160:4, 194:11-195:3, 207:12-22, 211:7-212:3 (John V. Romita (“Romita”) testifying that he did not have a contract with Marvel as a freelancer and that freelancers were free to sell work to other publishers); Ex. 5 at 371:3-25 (Stan Lee (“Lee”) testifying that Marvel “would only buy what [it] needed”); Ex. 6 at 36:17-21, 202:2-20 (Roy Thomas (“Thomas”) testifying that he had no contract with Marvel until 1974); Ex. 8 ¶ 10 (Joe Sinnott (“Sinnott”) attesting that he had no contract with Marvel and Marvel was very small and disorganized in the 1950s and 1960s); Ex. 8 ¶ 11 (Sinnott attesting that Marvel had no obligation to buy pages of his work and that Marvel paid only for the pages it wanted); Ex. 9 ¶ 8 (James Steranko (“Steranko”) Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 10 ¶ 12 (Richard Ayers (“Ayers”) attesting that he had no contract with Marvel from 1959 to 1975); Ex. 11 ¶ 9 (Gene Colan (“Colan”) attesting that he had no contract with Marvel until 1975); Ex.

13 ¶ 5-7 (Neal Adams (“Adams”) attesting that he had no contract with Marvel in the 1960s or 1970s and that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 17 at 39:25-40:4, 51:20-52:4, 298:8-14, 301:14-303:7 (Thomas testifying that he had no written contract from 1965 to 1974 and that Marvel did not have contracts with freelancers prohibiting them from selling work to other publishers); Ex. 22 at 287:22-288:12 (Lieber testifying that he had no contract with Marvel in the 1950s or 1960s); Ex. 24 at 79:2-8 (Paul Levitz (“Levitz”) testifying that Marvel did not have contracts with any freelancer until the mid-1970s).

22. **Marvel’s Statement:** Marvel’s editors, including Stan Lee and Roy Thomas, supervised the creation of Marvel’s comics subject only to Martin Goodman, who had ultimate authority to supervise and direct the creation of all Marvel comic books. Lens Decl., Ex. 2 17:8-18:13 (Thomas testifying that “subject to the publisher, [Lee] was in charge of everything. He oversaw the writing, he oversaw the artists and the art that came in. You know, everything went through him with the help of the production manager in particular.”); Lens Decl., Ex. 2 24:17-23 (Thomas testifying how Marvel production manager Sol Brodsky “would call a freelancer in . . . to keep an eye on him to make sure he finished the job on deadline or . . . had something that had to be corrected or changed”); Lens Decl., Ex. 2 37:10-39:6 (Thomas testifying that when he became editor-in-chief, he was “in charge of, you know, all the artists, the writers, the colorists, the letterers and so forth”); Lens Decl., Ex. 13 16:8-19 (Lee confirming that he would “give instructions to the artists as to how [he] wanted the story to go” and that it was his “responsibility” to oversee “the creative editorial aspects of the comic books that were created”); Lens Decl., Ex. 12 67:16-68:6 (Thomas testifying that Lee “decided which artist would do a cover for a particular issue[,] . . . they were reviewed by Stan, . . . then they were all reviewed eventually by Martin Goodman as publisher”); Lens Decl., Ex. 13 44:4-17 (Lee testifying that



because “we considered the covers the most important part of the book,” he “spent a lot of time on” their look and layout); Lens Decl., Ex. 13 16:3-19 (Lee testifying that he would “give instructions to the artists as to how [he] wanted the story to go” and “oversaw . . . creative editorial aspects of the comic books that were created, . . . because [he] had to answer to the publisher, Martin Goodman, and he had to be happy with what I was doing”); Lens Decl., Ex. 4 97:7-9 (Lee testifying that comic book production “was [his] responsibility, the whole thing”); Lens Decl., Ex. 4 93:23-94:5 (Lee testifying that he supervised Marvel’s writers and artists); Lens Decl., Ex. 2 80:24-81:12 (Thomas testifying that “[s]ubject to the publisher, [Lee had] complete authority” over artwork in Marvel comics); Lens Decl., Ex. 2 125:18-126:1 (Thomas testifying that Lee “was always the ultimate authority unless Martin Goodman stepped in, and that was mostly on covers”); Lens Decl., Ex. 7 219:11-220:11 (Thomas testifying that “the ultimate say, as far as I know, was the publisher, . . . Martin Goodman”); Lens Decl., Ex. 13 97:8-11 (Lee testifying that he “couldn’t do any book unless Martin approved of it”); Lens Decl., Ex. 4 124:19-125:4 (Lee testifying that “[i]t was always [Goodman’s] decision” as to what to publish, and “he exercised the authority ultimately to publish the last edition of ‘Amazing Fantasy’”); Lens Decl., Ex. 4 124:3-18 (Lee testifying that he “loved” the “Amazing Fantasy” books but “Mr. Goodman decided to cancel them because they weren’t selling”); Thomas Decl. ¶¶ 7-8 (“As part of [Marvel’s] established framework [for creating comics in the 1960s], Stan Lee supervised and directed Marvel’s comic book-creation process subject only to Martin Goodman”); *see also* Lens Decl., Ex. 55 at 4; Lens Decl., Ex. 59 at 3.

**RESPONSE: Counterclaimant disputes that “Marvel,” Lee, or Thomas directed or supervised Ditko’s creative process regarding his works. Ditko created his material from his own studio, on his own time, pursuant to character and story charts that he created on**

**his own volition, and often refused to make any changes to his work.** *See* Toberoff Decl. Ex. 1 at 12-13 (Evanier Rep. explaining the custom and practice of freelancers creating their material from home and noting that Ditko was unique in renting and paying for a separate studio and that it was Ditko’s regular practice to maintain a chart mapping out the future development of stories and characters so as to introduce elements into current stories and then use those elements in stories many months down the line); Ex. 24 at 123:18-21 (Levitz testifying that Ditko created work from his own studio); Ex. 35 at DITKO-0193 (Ditko writing that he planted seeds of subplots in stories that would work their way through the issues until it was time for those sub-stories to play an active role later when the time was right); Ex. 58 at 3 (Ditko writing when he took over the *Spider-Man* stories he “knew in advance the [*Spider-Man*] story line like the best (worst) time for Aunt May to have a heart attack”); Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko’s practice of refusing to make changes and in such case, Marvel’s custom of having staff make such changes after the work had been submitted to and purchased by Marvel); Ex. 3 at 75:18-20, 243:13-244:23, 246:5-9 (Romita testifying that he, or someone else Lee could find in the Marvel office, would be asked to make changes to other artists’ work after it had been submitted and would not be paid any extra for making these changes and noting specifically that when Lee did not like something on a Ditko cover, he asked Kirby to change it); Ex. 19 at 6, “Legends at Loggerheads!” (Thomas explaining example of when Lee incorrectly dialogued a *Spider-Man* story in a way Ditko had not intended, Ditko refused to accede to Lee’s chosen direction); Ex. 21 at 41:7-18 (Steranko testifying that Marvel had production assistants to make changes to work after it had been submitted by artists); Ex. 35 at DITKO-0193 (Ditko writing that he ignored comments from Lee and Brodsky and only made changes to stories when he agreed with them); Ex. 82 (Lee explaining in January 9, 1966 published interview: “**I don’t plot**

**Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I'll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he's the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next,** but it's interesting to work that way.") (emphasis added); Ex. 83 at 7 (same); Ex. 4 at 33:25-34:2 (Lee testifying that freelancers mostly worked from home); Ex. 17 at 24:5-25:4 (Thomas testifying that artists worked from home as freelancers and rarely, if ever, came into the office); Ex. 2 at 76:4-24 (Lieber testifying that he created his freelance work from home and used his own supplies); Ex. 3 at 16:22-24, 194:14-195:3, 209:16-210:7 (Romita testifying that he purchased his own materials and worked from home); Ex. 6 at 30:21-24 (Thomas testifying that he did his freelance writing from home); Ex. 8 ¶ 9 (Sinnott attesting that he worked from home with his own materials); Ex. 9 ¶ 10 (Steranko attesting that he worked from home and supplied his own materials, for which Marvel never reimbursed him); Ex. 10 ¶ 10 (Ayers attesting that he worked from home and paid for his own materials); Ex. 11 ¶ 8 (Colan attesting that he created his freelance art from home and paid for his own materials); Ex. 13 ¶ 7 (Adams attesting that he worked from home and paid for his own materials); Ex. 16 at 117:15-16 (Nanci Solo ("Solo") testifying that Colan worked from home); Ex. 22 at 286:17-287:19 (Lieber testifying that he worked from home and paid for his own typewriter);

**Counterclaimant further disputes that Ditko created his works under "Marvel" /Lee/ Thomas's direction or supervision, as Ditko created many of his works in question when Lee and he were no longer communicating, and thus, Lee would not know anything about the *Spider-Man* or *Dr. Strange* stories Ditko was creating until Ditko dropped off his**

**finished pages.** See Toberoff Decl. Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); Ex. 17 at 311:2-17 (Thomas testifying that, by the time he started at Marvel in mid-1965, Ditko and Lee were not speaking anymore because they had been fighting over the direction of the *Spider-Man* series); *id.* at 29:19-30:8, 83:13-18 (Thomas testifying that by the time Thomas began at Marvel in mid-1965, Ditko was plotting and penciling *Dr. Strange* stories, which Thomas would dialogue); *id.* at 311:18-312:25 (Thomas testifying that Ditko plotted and drew *Spider-Man* stories completely on his own for more than one year before he left in 1966). Ex. 24 at 124:5-24 (Levitz testifying that Ditko and Lee stopped speaking in the last year of Ditko's time with Marvel because Ditko was not getting proper credit for his contributions to the stories); Ex. 35 at DITKO-0193 (Ditko writing that he and Lee stopped speaking around 1964 and thus from then on, Ditko had complete creative control of the *Spider-Man* and *Dr. Strange* stories, which he was plotting and penciling until he left in 1966); Ex. 58 at 3 (Ditko writing that he took over all plotting of the *Spider-Man* stories); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: "Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it's full of unexpected surprises!"); Ex. 72 at 225 (*Strange Tales* No. 135: "Plotted and Illustrated by Fandom's Favorite Fiend: Steve Ditko"); Ex. 25 (Ditko: "Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art."); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue to the balloons); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 1 at 13 (Evanier

Rep. describing the common practice of independent freelancers supervising themselves and editing their own work prior to submission); Ex. 82 (Lee explaining in January 9, 1966 published interview: **“I don’t plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I’ll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he’s the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won’t let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he’ll come up with next,** but it’s interesting to work that way.”) (emphasis added); Ex. 83 at 7 (same).

**Counterclaimant further disputes that Ditko created Dr. Strange pursuant to “Marvel” /Lee/ Thomas’s direction or supervision, as Ditko wrote and drew the first *Dr. Strange* story completely “on spec” based on a character he was toying with since 1946.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko’s Dr. Strange character which began as a five-page story Ditko wrote and drew on spec introducing the character which he presented to Lee); Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea, and I figgered we’d give it a chance” in a contemporaneous letter dated January 9, 1963 and noting the story was a “5-page filler”); Ex. 57 at 2 (Ditko writing that Dr. Strange was a great opportunity for him to try out all kinds of ideas, which “never fit in to Marvel’s world of heroes”); Ex. 33 (Ditko’s letter post-marked August 6, 1946 to his brother

Patrick Ditko enclosing an early sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko's early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived at the address written on the letter envelope of composite Ex. 33, and that, in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany).

23. **Marvel's Statement:** Marvel assigned Ditko, like other freelancers, to contribute to specific Marvel comic books and could reassign him to different comics when it deemed it necessary or appropriate to do so. Lens Decl., Ex. 48 at 3 (Ditko admitting that he "was given the job of drawing Spider-Man" but could not speak to "[w]hy, exactly"); Lens Decl., Ex. 51 at 3 (Ditko explaining that, "[a]s a freelancer, [his] focus had to be on what is next, what has to be done," as "[t]he last job is history"); Lens Decl., Ex. 54 at 4 (Ditko acknowledging that, "[s]ince [he] was a freelancer, Stan Lee could have taken [him] off S[pider]-M[an] anytime he wanted—he did it for a S[pider]-M[an] story pencilled by Jack Kirby"); Lens Decl., Ex. 2 27:19-28:7 (Thomas testifying that his "responsibilities as a freelance writer" were "[j]ust to write whatever Stan told [him] to write"); Lens Decl., Ex. 2 56:2-57:7 (Thomas testifying that Marvel artists did not "have the ability to select which comics they were going to work on" or "the ability to select which artists, letterers, or colorists they were going to be working with" during the Time Period); Lens Decl., Ex. 12 56:16-18 (Thomas confirming that it was Stan Lee who "decided which writer and artist would work on a particular comic book or issue"); Lens Decl., Ex. 2 148:22-151:25 (Thomas testifying about why freelancers might be removed from certain comic books, including for "lateness, undependability," or the editor's decision that "they just weren't doing

the right job, or even if they were okay . . . [that] a little bit of musical chairs might get us a better arrangement of people”); *see also* Lens Decl., Ex. 2 88:17-89:13, 131:8-19, 145:23-148:20, 164:3-9; Lens Decl., Ex. 12 58:10-13, 58:24-59:5, 59:6-21; Lens Decl., Ex. 6 41:14-24; Lens Decl., Ex. 15 16:8-19; Lens Decl., Ex. 42 at 6; Lens Decl., Ex. 53 at 2; Lens Decl., Ex. 13 14:5-8, 23:18-21; Lens Decl., Ex. 3 119:5-11, 138:18-24, 139:17-140:2, 140:8-11, 224:5-10, 224:15-23, 241:25-242:14; Lens Decl., Ex. 9 14:5-8, 110:21-24.

**RESPONSE: Counterclaimant disputes that Ditko was “assigned” to contribute to comic books, as Marvel had no contract or other legal authority to “assign” Ditko to do anything. Ditko was an independent artist and was free to accept any proposal by Lee that Ditko contribute to a particular story or to reject such proposal without consequence.**

Marvel has not produced any contemporaneous agreement with Ditko from the Period for his creative services, nor any other evidence reflecting any bilateral rights and obligations between Ditko and Magazine Management (nor any other alleged Marvel predecessor) in the Period, nor has Marvel alleged that any such agreement or bilateral legal rights and obligations existed between such parties in the Period. *See* Toberoff Decl. Ex. 17 at 298:8-14 (Thomas testifying that freelancers did not have contracts with Marvel until Thomas’s in 1974, which was the first); Ex. 36 at 7 (Marvel admitting it had no written contract with Ditko in the 1960s); Ex. 1 at 10 (Evanier Rep. describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 3 at 207:12-22 (Romita testifying that freelancers were free to sell work to other publishers); Ex. 9 ¶ 11 (Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 13 ¶¶ 5-6 (Adams attesting that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling

work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee's *Spider-Man* story ideas and characters such as, for instance, Lee's idea for a Spider-Woman character, or Lee's idea of making Aunt May more glamorous); Ex. 3 at 219:12-24 (Romita testifying that he turned down Lee's offer to submit material to Marvel and preferred to sell freelance work to DC Comics); Ex. 21 at 29:9-30:17 (Steranko testifying that he was not given "assignments," but rather, he had the option to work on some books or to not if he chose not to); Ex. 24 at 89:2-11 (Levitz testifying that freelancers were free to decline "assignments"); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he later started working with Marvel again, but refused to do any *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in *Spider-Man* panels for Ditko to work on, he "left [them] blank for someone else to fill in"); *id.* (Ditko writing that he "refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it").

**In addition, Ditko often took control over the characters he created and indeed, plotted and drew each *Spider-Man* and *Dr. Strange* story from its inception, until he stopped submitting and selling his stories to Marvel in early 1966.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Spider-Man and Dr. Strange and Ditko's role in creating numerous supporting characters before he stopped selling work to Marvel in 1966); Ex. 25 (Ditko: "Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art."); Ex. 26 at 83 (Lee writing concerning Dr. Strange: "Steve Ditko is one of the best plot men in the biz. When it comes to



dreaming up story ideas, putting them together intricately, panel by panel, and utilizing the best of cinematic techniques, the guy's a whiz. Thus, the spectacular saga that is about to knock you out was basically concocted by our own Mr. D[itko]"); *id.* (Lee writing concerning *Dr. Strange*, "After [Ditko] did the hard part—after he dreamed up the story and illustrated it in his own unique style—I then got to the fun part. I wrote the squiggly little words: the dialog balloons and captions"). Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* stories while Ditko and Lee were not speaking); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko, on his own, plotted and drew *Spider-Man* for more than one year before he left in 1966, did not work pursuant to the "Marvel Method," and that Lee would not even know anything about the story until it was penciled and submitted by Ditko); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and captions); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: "Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it's full of unexpected surprises!"); Ex. 72 at 225 (*Strange Tales* No. 135: "Plotted and Illustrated by Fandom's Favorite Fiend: Steve Ditko"); Ex. 82 (Lee explaining in January 9, 1966 published interview: "**I don't plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I'll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he's the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next,** but it's interesting to work that way.") (emphasis added); Ex. 83 at 7 (same).

24. **Marvel’s Statement:** Marvel generally provided Ditko, like other freelancers, with a plot or synopsis, which could be written or oral, that outlined the key elements of the story it wanted penciled. Lens Decl., Ex. 48 at 2 (Ditko admitting that “Stan provided the plot ideas”); Lens Decl., Ex. 46 at 3 (Ditko explaining that Stan Lee “create[ed]” the “Spider-Man” name and then wrote the original “synopsis for the artist [(i.e., Ditko)]”); Lens Decl., Ex. 2 28:8-21 (Thomas describing the plotting process); Lens Decl., Ex. 13 20:11-21:25 (Lee testifying about the same); Lens Decl., Ex. 9 at 47:20-48:8 (Lieber testifying that Stan Lee “would discuss a story or a plot with the artist and the artist . . . would lay it out and draw it with enough knowledge about what the story is and leave room for dialogue to come later”); Lens Decl., Ex. 69; Lens Decl., Ex. 70; Lens Decl., Ex. 71 at 3:25-6:09 (Lee explaining how Marvel comics were “sort of like continuing soap operas”); *see also* Lens Decl., Ex. 11 218:14-219:16; Lens Decl., Ex. 3 113:21-114:17, 118:24-119:4, 123:11-124:8, 124:16-125:4, 222:16-23; Lens Decl., Ex. 9 12:19-13:5.

**RESPONSE:** Counterclaimant disputes that “Marvel” provided Ditko with plots or synopses, given that Lee did his writing and made his story contributions not as an editor but as an independent freelancer for which he was paid by the page by Magazine Management, and that the shell companies which registered the relevant copyrights had no business operations or employees, no contact with Ditko, did not acquire Lee’s freelance writing contributions and therefore could not, and did not, supply Ditko with anything. *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee’s common practice of composing dialogue as a freelancer, not as Marvel’s editor and doing his freelancing from home two of the five workdays per week, for which he was paid on a per-page basis as a freelancer); Ex. 3 at 41:19-42:2 (Romita testifying that Lee would stay home several days per week to write); Ex. 4 at

17:17-25 (Lee testifying that he was paid as a freelancer for his writing and was on salary for his work as an editor); Ex. 17 at 27:2-18, 30:9-13, 31:22-32:7, 276:2-14 (Thomas testifying that he was a staff writer/assistant editor in the 1960s and got a salary for that work, but separately freelanced when writing stories and was paid at a per-page rate on a separate check like other freelancers); Ex. 22 at 255:10-256:6 (Lieber testifying that Lee wrote stories and scripts as a writer, not as an editor, because writing is “not what an Editor does”); Ex. 55 at 62:18-63:18 (Lee testifying that he got paid a salary as editor and separately for his writing); Ex. 56 at 91:20-92:6 (Lee testifying that he got paid a salary as editor and separately as a freelancer pre page for his writing); Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that the shell companies had no employees, actual offices, or business activities, and had no contact with any freelancer); Ex. 6 at 200:2-24 (Thomas testifying that he was hired by Magazine Management in 1965); Ex. 17 at 272:23-275:2 (Thomas testifying that he was paid and employed by Magazine Management/Marvel Comics, and then Perfect Film/Cadence); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period).

**Counterclaimant further disputes that Lee “generally” provided a plot or synopsis to Lee as Ditko was well-known to be extremely independent when it came to the creation**

**of his stories and characters because of this Lee stopped communicating with Lee in the Period.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing the common practice of independent freelancers supervising themselves and editing their own work prior to submission); *id.* at 12 (Evanier Rep. describing Ditko’s regular practice of maintaining a chart mapping out the future development of a character so he could introduce elements into current issues and then use those elements in issues many months down the line); Ex. 35 at DITKO-0193 (Ditko writing that he planted seeds of subplots in stories that would work their way through the issues until it was time for those sub-stories to play an active role later when the time was right); Ex. 58 at 3 (Ditko writing when he took over the *Spider-Man* stories he “knew in advance the [*Spider-Man*] story line like the best (worst) time for Aunt May to have a heart attack”); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko plotted and drew *Spider-Man* stories completely on his own for more than one year before he left in 1966); Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue [in the balloons]); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he later started working with Marvel again, but refused to do any *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in *Spider-Man* panels for Ditko to work on, he “left [them] blank for

someone else to fill in”); *id.* (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee’s *Spider-Man* story ideas and characters such as, for instance, Lee’s idea for a Spider-Woman character, or Lee’s idea of making Aunt May more glamorous); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: “Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it’s full of unexpected surprises!”); Ex. 72 at 225 (*Strange Tales* No. 135: “Plotted and Illustrated by Fandom’s Favorite Fiend: Steve Ditko”); Ex. 82 (Lee explaining in January 9, 1966 published interview: **“I don’t plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories. I guess I’ll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he’s the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. He won’t let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he’ll come up with next, but it’s interesting to work that way.”**) (emphasis added); Ex. 83 at 7 (same).

**Counterclaimant further disputes that Ditko was provided any plot or synopsis for the first *Dr. Strange* story, as Ditko created that story on his own, utilizing a character he had been playing with since 1946 well before he met Marvel or Lee. Ditko also often repurposed characters and character elements (which drove his story plots) that Ditko had created years prior and included them into stories he sold to Magazine Management, evidencing that Lee/Marvel were not “generally” providing Ditko with story plots. See Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko’s *Dr. Strange* character which began as a five-page story Ditko wrote and drew on spec introducing the character which he presented to Lee); Ex. 25 (Ditko: “*Dr. Strange* has always**

been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea, and I figgered we’d give it a chance” in a contemporaneous letter dated January 9, 1963); Ex. 33 (Ditko’s letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an initial sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko’s early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived in Johnstown, PA at the address written on the letter envelope of composite Ex. 33, and that in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as a “5-page filler,” which was a great opportunity to try out all kinds of ideas like Dr. Strange, which “never fit in to Marvel’s world of heroes”); Ex. 62 at 4-5 (Dr. Strange used his hands to cast teleportation and other spells in *Strange Tales* No. 139 (1965)); Ex. 63 at 2 (same in *Strange Tales* No. 126 (1964)); Ex. 70 at 8-9 (same in *Strange Tales* No. 129 (1965)); *compare* Ex. 61 at 3 (Ditko’s character used his hands to cast spells in 1959 in Charlton Comics’ *Space Adventures* No. 27); *see also* Ex. 66 at 10 (in *Strange Tales* No. 137 (1965), Dr. Strange used a device—the Eye of Agamotto—to transport through space and time); *compare* Ex. 65 at 4-5 (In Charlton Comics’ *Out of this World* No. 7 (1958), Ditko’s character used similar artifact to transport characters in a swirl of visual effects through space and time); *see also* Ex. 68 at 4-5 (in *Strange Tales* No. 122 (1964), Dr. Strange traversed through

different dimensions and journeyed through alternate planes of existence); Ex. 69 at 1 (same in *Strange Tales* No. 134 (1965)); *compare* Ex. 67 at Cover, 4-5 (Ditko used same effect in Charlton Comics' *Strange Suspense* No. 32 (1957)); *see also* Ex. 73 at 6 (Norman Osborn's first appearance in the *Spider-Man* series in 1965); Ex. 74 at 10 (Norman Osborn's identity revealed to readers in *Amazing Spider-Man* No. 37 (1966)); *compare* Ex. 75 at 1-2 (Norman Osborn's precursor—including corporate villainy and distinct curled hairstyle—in 1957 in Charlton Comics' *Strange Suspense Stories* No. 33, *Director of the Board*); *see also* Ex. 60 at 2, 8 (*Amazing Fantasy* No. 15 (1962), the issue in which Spider-Man and Ditko's Aunt May character first appeared) *compare* Ex. 79, "All Those Eyes" at 1-3 (Aunt May's forerunner character appeared in Ditko's story in Charlton Comics' *Out of this World* No. 6 (1957)); *see also* Ex. 76 at 1, 4 (Ditko's Electro character in *Amazing Spider-Man* No. 9 (1964)); *compare* Ex. 77 at 1, 4-5 (Ditko's electrically powered man, the predecessor of Electro, first appeared in Charlton Comics' *Strange Suspense Stories* No. 48 (1960)); *see also* Ex. 78 at 1, 5-6, 8-9 (Ditko introduces the Chameleon—a character who used various masks to carry out his villainy—in *Amazing Spider-Man* No. 1 (1963)); *compare* Ex. 79, "All Those Eyes" at 2-3 (Chameleon precursor—a spy character who used various masks in his espionage with a similar back story as the Chameleon—appeared in Ditko's "All Those Eyes" story he sold to Charlton Comics in 1957).

25. **Marvel's Statement:** Marvel tasked Ditko, like other freelancers, with proposing new characters as part of his assignment, subject to the ultimate discretion of Marvel. Lens Decl., Ex. 13 54:16-56:9 (Lee testifying that it "was part of what [an artist's] assignment was" to "introduce . . . new characters in the stories"); Lens Decl., Ex. 13 72:21- 73:23 (Lee testifying that "[t]he artist in every strip always creates new characters to flesh out the strip and to make the

characters living in the real world,” although such additions were subject to the approval of Lee and publisher Martin Goodman); Lens Decl., Ex. 13 79:3-19 (Lee testifying that it would be the responsibility of “the Editor or the Publisher” to “make the decision to take [a new, minor] character and make him or her a separate character for a new comic”); Lens Decl., Ex. 12 55:4-15 (Thomas confirming that artists would sometimes “come up with ideas for new characters,” and that it was indeed “part of the artist’s assignment . . . to introduce new characters into a comic book series” if it “would further the plot”); *see also* Lens Decl., Ex. 12 65:13-66:7.

**RESPONSE: Counterclaimant disputes that “Marvel tasked Ditko” with proposing new characters as part of his “assignment[s],” as Ditko and Magazine Management had no legal obligations to one another such that “Marvel” could “task” or “assign” Ditko to do anything. Ditko thus plotted and drew his stories the way he wished, and freely rejecting any of Lee’s ideas Ditko did not like or agree with. *See* Toberoff Decl. Ex. 14 at 11, 13** (Evanier Rebuttal Rep. explaining the custom and practice that comic book freelancers were free to decline work or to make changes to their work); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee’s *Spider-Man* story ideas and characters such as, for instance, Lee’s idea for a Spider-Woman character, or Lee’s idea of making Aunt May more glamorous); Ex. 58 at 4 (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”); Ex. 21 at 29:9-30:17 (Steranko testifying that he was not given “assignments,” but rather, he had the option to work on some books or to not as he chose to); Ex. 24 at 89:2-11 (Levitz testifying that freelancers were free to decline “assignments”); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he much later started working with Marvel again, but refused to do any more *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in



*Spider-Man* panels for Ditko to work on, he “left [them] blank for someone else to fill in”); Ex. 82 (Lee explaining in January 9, 1966 published interview: **“I don’t plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I’ll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he’s the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won’t let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he’ll come up with next,** but it’s interesting to work that way.”) (emphasis added); Ex. 83 at 7 (same).

**Counterclaimant further disputes that Ditko was “tasked” with creating the Dr. Strange character, as Ditko created that story on his own, utilizing a character he had been playing with since 1946 well before he met Marvel or Lee.** *See* Toberoff Decl. Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea, and I figgered we’d give it a chance,” in a contemporaneous letter dated January 9, 1963); Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko’s Dr. Strange character which began as a five-page story Ditko wrote and drew on his own introducing the character which he presented to Lee); Ex. 49 at 1 (first published appearance of Dr. Strange in *Strange Tales* No. 110); Ex. 33 (Ditko’s letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an initial sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad,

enclosing Ditko's early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived in Johnstown, PA at the address written on the letter envelope of composite Ex. 33, and that in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as his 5-page story and that Dr. Strange was a great opportunity to try out all kinds of ideas which "never fit in to Marvel's world of heroes").

26. **Marvel's Statement:** After Ditko submitted his assignment, a Marvel editor would review the penciled pages and, as appropriate, discuss changes, additions, or corrections—like Marvel did with other freelancers. Lens Decl., Ex. 48 at 2 (Ditko explaining that he and Stan Lee "would go over the penciled story/art pages" together and discuss changes, additions, or corrections to them); Lens Decl., Ex. 29 (original art for *Amazing Fantasy* #15 showing editorial comments in the margins from Lee to Ditko on Spider-Man panels); Lens Decl., Ex. 2 126:2-127:12 (Thomas testifying that Lee would review the artwork pages submitted by assigned artists and that, as editor, "it was his job to supervise"—"[i]f something went wrong, the publisher wasn't going to blame . . . the artist, he was going to go to Stan Lee"); Lens Decl., Ex. 12 67:16-68:6 (Thomas testifying that Lee, and then Goodman, would review all covers before they were finalized); Lens Decl., Ex. 3 170:18-21 (Lieber testifying that Lee "had to approve the plot and the artwork and the other things and – before it went to the engraver"); Lens Decl., Ex. 6 39:2-24 (Lee testifying about the supervisory role of Marvel's art director and editor, including that it was the art director's role to "look[] over the artwork and sa[y], 'Gee, I think that ought to be a closeup instead of a long shot or it is a little hard to understand what he is doing, can you clarify

that panel,” and generally “discuss the artwork with the artist”); *see also* Lens Decl., Ex. 13 20:11-21:25; Lens Decl., Ex. 11 218:14-219:16; Lens Decl., Ex. 9 16:20-17:4.

**RESPONSE: While Counterclaimant admits someone at Magazine Management would generally review Ditko’s submitted material prior to its publication and may from time to time desire changes or corrections to such material, as that is a normal part of the publishing process, Counterclaimant disputes that Ditko was required to make any requested changes and Ditko often refused to make changes to his work. Once Magazine Management purchased and Ditko assigned ownership of his material to Magazine Management, it could make any revisions or corrections it wanted and had production staff on hand to do so.** *See* Toberoff Decl. Ex. 35 at DITKO-0193 (Ditko writing that he ignored comments from Lee and Brodsky and only made changes to stories when he agreed with them); Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko’s practice of refusing to make changes and in such case, Marvel’s customary practice of having staff make such changes after the work had been submitted to and purchased by Marvel); Ex. 3 at 75:18-20, 243:13-244:23, 246:5-9 (Romita testifying that he, or someone else Lee could find in the Marvel office, would be asked to make changes to other artists’ work after it had been submitted and would not be paid any extra for making these changes and noting specifically that when Lee did not like something on a Ditko cover, he asked Kirby to change it); Ex. 19 at 6, “Legends at Loggerheads!” (Thomas explaining example of when Lee incorrectly dialogued a *Spider-Man* story in a way Ditko had not intended, Ditko refused to accede to Lee’s chosen direction); Ex. 21 at 41:7-18 (Steranko testifying that Marvel had production assistants to make changes to work after it had been submitted by and purchased from artists).

27. **Marvel’s Statement:** Marvel could decide to not publish material that it had assigned to Ditko or other freelancers, but, to the extent it did, typically did so only in connection with comic book covers (a top priority for Marvel’s publisher Martin Goodman), not interior pages. Lens Decl., Ex. 54 at 4 (Ditko remarking that he “got more out of working for” Charlton Comics than for Marvel because of its “picky editors, ‘corrections’ etc.”); Lens Decl., Ex. 48 at 5 (Ditko discussing Marvel’s rejection of his Spider-Man cover and reassignment of the task to Jack Kirby); Lens Decl., Ex. 47 at 2 (same); Lens Decl., Ex. 30 at 2 (“*Amazing Fantasy* #15 unused cover art by Steve Ditko”); Lens Decl., Ex. 13 22:11-23:19 (Lee confirming that he “always maintain[ed] the ability to edit and make changes or reject what the other writers or artists had created”); Lens Decl., Ex. 2 286:15-23 (Thomas testifying that Goodman’s “main concern was the covers” and that he was known to scrutinize them); Lens Decl., Ex. 12 67:16-68:6 (Thomas testifying that Stan Lee would review the covers before publication, and then “they were all reviewed eventually by Martin Goodman as publisher”); *see also* Lens Decl., Ex. 2 161:8-20; Lens Decl., Ex. 13 44:4-17; Lens Decl., Ex. 41 at 4; Lens Decl., Ex. 49 at 3; Thomas Decl. ¶¶ 20-21.

**RESPONSE:** Counterclaimant admits that Magazine Management, like all other publishers, could choose what it published, but once again denies that Marvel could “assign” Ditko to do anything in any legal employment sense as Marvel had no contract with Ditko or other legal authority over him. Ditko was an independent artist and was free to accept or reject any proposal by Magazine Management or Lee without consequence. Marvel has not produced any contemporaneous agreement with Ditko from the Period for his creative services, nor any other evidence reflecting any bilateral rights and obligations between Ditko and Magazine Management (nor any other alleged Marvel predecessor) in the Period, nor

has Marvel alleged that any such agreement or bilateral legal rights and obligations existed between such parties in the Period. *See* Toberoff Decl. Ex. 17 at 298:8-14 (Thomas testifying that freelancers did not have contracts with Marvel until Thomas's in 1974, which was the first); Ex. 36 at 7 (Marvel admitting it had no written contract with Ditko in the 1960s); Ex. 1 at 10 (Evanier Rep. describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 3 at 207:12-22 (Romita testifying that freelancers were free to sell work to other publishers); Ex. 9 ¶ 11 (Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 13 ¶¶ 5-6 (Adams attesting that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee's *Spider-Man* story ideas and characters such as, for instance, Lee's idea for a Spider-Woman character, or Lee's idea of making Aunt May more glamorous); Ex. 3 at 219:12-24 (Romita testifying that he turned down Lee's offer to submit material to Marvel and preferred to sell freelance work to DC Comics); Ex. 21 at 29:9-30:17 (Steranko testifying that he was not given "assignments," but rather, he had the option to work on some books or to not if he chose not to); Ex. 24 at 89:2-11 (Levitz testifying that freelancers were free to decline "assignments"); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he later started working with Marvel again, but refused to do any *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in *Spider-Man* panels for Ditko to work on, he "left [them] blank for someone else to

fill in”); *id.* (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”).

28. **Marvel’s Statement:** Marvel could require Ditko, like other freelancers, to make changes to his work (or could make the changes directly), and sometimes did so. Lens Decl., Ex. 48 at 2 (Ditko explaining that he and Stan Lee “would go over the penciled story/art pages” together and discuss changes, additions, or corrections to them”); Lens Decl., Ex. 53 at 3 (Ditko writing about a Spider-Man cover in which he “had S[pider]-M[an] leaping toward the Molten Man” but “S[pider]-M[an] was changed to leaping across the Molton Man and off the cover”); Lens Decl., Ex. 54 at 4 (Ditko complaining about Marvel’s “picky editors” and their “corrections”); Lens Decl., Ex. 29 (original art for *Amazing Fantasy* #15 showing editorial comments in the margins from Lee to Ditko on Spider-Man panels); Lens Decl., Ex. 2 44:22-45:5 (Thomas testifying that he “observe[d]” Marvel editors “actually making changes to work that had been done by freelance writers and artists,” in terms of “both . . . lettering and artwork”); Lens Decl., Ex. 2 127:17-20 (Thomas confirming that “Stan Lee ha[d] the ability to just have changes made to artwork without the artist’s involvement”); Lens Decl., Ex. 2 133:11-13 (similar); Lens Decl., Ex. 2 24:17-23 (Thomas testifying how Marvel production manager Sol Brodsky “would call a freelancer in, a letterer or an artist to come in . . . simply because they had something that had to be corrected or changed and they needed more work than just the one production person could do”); Lens Decl., Ex. 2 41:16-20 (Thomas confirming that he understood Marvel could “request that [he], for example, do rewrites or revisions to work that you had done”); Lens Decl., Ex. 13 16:20-17:4 (Lee confirming that it “was [his] job” to “not only make assignments but also to edit and change things that other writers or artists did,” and that, “[i]f, for example, I saw some art work, and I felt there wasn’t enough action on a page, or

it was confusing, the reader might not know what it was, or in a script if I felt there was too much dialogue or too little dialogue, . . . it was up to me to make the stories as good as I could make them”); Lens Decl., Ex. 3 128:23-129:2 (Lieber testifying that “of course” Stan Lee “had the right [to] make the changes to [Lieber’s] scripts”); Lens Decl., Ex. 3 133:14-134:5 (Lieber testifying that, when Lee went over his work, he would explain to Lieber, ““Oh, you could have said this. You could have done that,’ and he’d make some little corrections” but “as time went on, he had fewer to make”); *see also* Lens Decl., Ex. 52 at 4; Lens Decl., Ex. 2 42:24-44:18, 333:18-334:5; Lens Decl., Ex. 12 113:18-114:11; Lens Decl., Ex. 3 137:11-20, 138:2-5; Lens Decl., Ex. 13 18:17-19:17, 22:11-14, 33:25-34:7; Thomas Decl. ¶ 20.

**RESPONSE:** Counterclaimant disputes that “Marvel” could “require” Ditko to make any requested changes to his material, as he had no contract with any Marvel entity during the Period and was free to accept or decline “Marvel’s” suggestions. Magazine Management had production staff on hand and was free to make changes to Ditko’s material only *after* Ditko had created, sold and assigned it to Magazine Management. *See* Counterclaimant’s Response to Marvel Statement No. 27, *supra*, incorporated herein by reference. *See also* Toberoff Decl. Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko’s practice of refusing to make changes and in such case, Marvel’s custom of having staff make such changes after the work had been submitted to and purchased by Marvel); *id.* at 11, 13 (Evanier Rebuttal Rep. explaining the custom and practice of comic book publishers to reserve the right to purchase or not purchase freelancers’ submitted material, and that freelancers were free to decline to make changes to their work); Ex. 3 at 75:18-20, 243:13-244:23, 246:5-9 (Romita testifying that he, or someone else Lee could find in the Marvel office, would be asked to make changes to other artists’ work after it had been submitted and would not be paid any extra for

making these changes and noting specifically that when Lee did not like something on a Ditko cover, he asked Kirby to change it); Ex. 19 at 6, “Legends at Loggerheads!” (Thomas explaining example of when Lee incorrectly dialogued a *Spider-Man* story in a way Ditko had not intended, Ditko refused to accede to Lee’s chosen direction); Ex. 21 at 41:7-18 (Steranko testifying that Marvel had production assistants to make changes to work after it had been submitted by artists); Ex. 35 at DITKO-0193 (Ditko writing that he ignored comments from Lee and Brodsky and only made changes to stories when he agreed with them); *id.* at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee’s *Spider-Man* story ideas and characters such as, for instance, Lee’s idea for a Spider-Woman character, or Lee’s idea of making Aunt May more glamorous); Ex. 17 at 298:8-14 (Thomas testifying that freelancers did not have contracts with Marvel until Thomas’s in 1974, which was the first); Ex. 36 at 7 (Marvel admitting it had no written contract with Ditko in the 1960s); Ex. 58 at 4 (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”).

29. **Marvel’s Statement:** Ditko, like other freelancers, did not always agree with Stan Lee’s choices, but Lee, as editor, had editorial control. Lens Decl., Ex. 59 at 2 (Ditko complaining that “Stan’s dialogue was too much his personal writing style with heroes/villains. He had his formula to handle all the hero/villains material.”); Lens Decl., Ex. 58 at 3 (Ditko writing that “I believe Stan loved writing those corny captions, etc. It added to reading appeal, but undercut a more serious growth of a teenagers [sic] in a heroic role”); Lens Decl., Ex. 52 at 4 (Ditko writing that “Stan’s ‘humor’ dialogue undercut Peter Parker, S[pider]-M[an] as a teenager growing up to become a professional hero like Captain America”); Lens Decl., Ex. 54 at 4 (Ditko commenting that “Stan’s writing style was completely wrong for SM [Spider-Man]” and that he “treated teen-age P. Parker as a seasoned veteran with his nonsensical comic dialogue



exchanges between a ‘Hero’ and ‘villains’”); Lens Decl., Ex. 60 at 3 (Ditko remarking that “[e]ven some poor plots by Stan, others, incompetent inkers didn’t sink my basic ideas for Doctor Strange”); Lens Decl., Ex. 57 at 4 (Ditko noting that it was “a mystery to [him] why no Doctor Strange covers”); Lens Decl., Ex. 53 at 3 (Ditko writing that it was “hard to understand, explain Stan’s motives with his likes, dislikes . . . . In a cover, I had S[pider]-M[an] leaping toward the Molten Man. S[pider]-M[an] was changed to leaping across the Molton Man and off the cover. What pleases an editor? They all have their likes and dislikes.”); Lens Decl., Ex. 54 at 4 (Ditko describing Marvel as having “picky editors” who adopted the creed that “[t]he editor is always right”); Lens Decl., Ex. 45 at 3 (Ditko explaining that, if he had the choice, he would do both drawing and inking, rather than having “other people . . . ink [his] pencils”); Lens Decl., Ex. 2 at 57:13-58:11 (Thomas testifying that every single artist at Marvel was “subject to the editorial discretion of the editor-in-chief” and that, during Lee’s tenure, all freelancers worked “subject to Stan Lee’s supervision and discretion”); Lens Decl., Ex. 13 16:8-19 (Lee confirming that he would “give instructions to the artists as to how [he] wanted the story to go” and that it was his “responsibility” to oversee “the creative editorial aspects of the comic books that were created”); *see also* Lens Decl., Ex. 61 at 4.

**RESPONSE:** Counterclaimant notes that all publishers control what they chose to publish and have editors to oversee what they publish. Counterclaimant disputes that Lee’s literary and writing contributions to the Works, if any, were done as Magazine Management’s “editor,” as creating stories and writing dialogue are not editorial functions, but the functions of a writer, which Lee did strictly as a freelancer, outside of Magazine Management’s offices and outside his editorial duties. Counterclaimant further notes that Lee dialogued the balloons and added captions to Ditko’s stories only *after* Ditko had

**already created, sold and assigned his works to Magazine Management.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee’s common practice of composing dialogue as a freelancer, not as Marvel’s editor and doing his freelancing from home two of the five workdays per week, for which he was paid on a per-page basis as a freelancer); Ex. 3 at 41:19-42:2 (Romita testifying that Lee would stay home several days per week to write); Ex. 4 at 17:17-25 (Lee testifying that he was paid as a freelancer for his writing and was on salary for his work as an editor); Ex. 17 at 27:2-18, 30:9-13, 31:22-32:7, 276:2-14 (Thomas testifying that he was a staff writer/assistant editor in the 1960s and got a salary for that work, but separately freelanced when writing stories and was paid at a per-page rate on a separate check like other freelancers); *id.* at 289:7-291:5 (Thomas testifying that he and Lee each did their writing in a freelance capacity from home in the 1960s and would come to the office only to do their editorial work); Ex. 22 at 255:10-256:6 (Lieber testifying that Lee wrote stories and scripts as a writer, not as an editor, because writing is “not what an Editor does”); *id.* at 256:7-257:12 (Lieber testifying that Lee wrote scripts from home); Ex. 55 at 62:18-63:18 (Lee testifying that he got paid a salary as editor and separately for his writing); Ex. 56 at 91:20-92:6 (Lee testifying that he got paid a salary as editor and separately as a freelancer pre page for his writing); *id.* at 94:6-95:18 (Lee testifying that there was very little editing of his own freelance written material).

**Counterclaimant further disputes that Lee could control Ditko’s creation of his material, as Ditko was extremely independent-minded, and told the stories his way based on a chart he created mapping out the macro-level plot and elements of his stories, and often declined to make changes to his material and to incorporate Lee’s ideas, if any.** *See* Toberoff Decl. Ex. 35 at DITKO-0193 (Ditko writing that he planted seeds of subplots in stories that would work their way through the issues until it was time for those sub-stories to play an

active role later when the time was right); Ex. 58 at 3 (Ditko writing when he took over the *Spider-Man* stories he “knew in advance the [*Spider-Man*] story line like the best (worst) time for Aunt May to have a heart attack”); Ex. 1 at 13 (Evanier Rep. describing the common practice of independent freelancers supervising themselves and editing their own work prior to submission); *id.* at 12 (Evanier Rep. describing Ditko’s regular practice of maintaining a chart mapping out the future development of stories and characters so he could introduce elements into current issues and then use those elements in issues many months down the line); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko plotted and drew *Spider-Man* stories completely on his own for more than one year before he left in 1966); Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue [in the balloons]); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he later started working with Marvel again, but refused to do any *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in *Spider-Man* panels for Ditko to work on, he “left [them] blank for someone else to fill in”); *id.* (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee’s *Spider-Man* story ideas and

characters such as, for instance, Lee’s idea for a Spider-Woman character, or Lee’s idea of making Aunt May more glamorous); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: “Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it’s full of unexpected surprises!”); Ex. 72 at 225 (*Strange Tales* No. 135: “Plotted and Illustrated by Fandom’s Favorite Fiend: Steve Ditko”); Ex. 82 (Lee explaining in January 9, 1966 published interview: **“I don’t plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I’ll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he’s the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won’t let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he’ll come up with next,** but it’s interesting to work that way.”) (emphasis added); Ex. 83 at 7 (same).

30. **Marvel’s Statement:** Marvel had final authority on the artwork, plot, and dialogue. Lens Decl., Ex. 2 18:3-13 (Thomas testifying that all decisions were “subject to the publisher” who “was in charge of everything”—“he oversaw the writing, he oversaw the artists and the art that came in,” and “everything went through him”); Lens Decl., Ex. 2 80:12-21 (Thomas testifying that Lee “had complete authority over” dialogue, “so – to edit it, have it rewritten or whatever”); Lens Decl., Ex. 2 80:24-81:12 (Thomas testifying that Stan Lee had “complete authority” over artwork—that is, “[s]ubject to the publisher”); Lens Decl., Ex. 2 125:18-126:1 (Thomas testifying that Lee “was always the ultimate authority unless Martin Goodman stepped in, and that was mostly on covers”); *see also* Lens Decl., Ex. 12 66:13-67:2, 117:11-22; Lens Decl., Ex. 16 37:13-39:7, 42:6-18; Lens Decl., Ex. 13 16:8-13, 51:17-52:5; Lens Decl., Ex. 55 at 4; Lens Decl., Ex. 59 at 3; Thomas Decl. ¶¶ 7-8.

**RESPONSE:** Counterclaimant admits that Marvel had authority over what it chose to purchase and what it would publish, like any publisher, but disputes that it had any legal authority over what Ditko chose to work on or his creative process. Ditko was an extremely independent-minded freelance artist with whom Marvel conspicuously avoided any contractual relationship in the Period. Marvel has not produced any contemporaneous agreement with Ditko from the Period for his creative services, nor any other evidence reflecting any bilateral rights and obligations between Ditko and Magazine Management (nor any other alleged Marvel predecessor) in the Period, nor has Marvel alleged that any such agreement or bilateral legal rights and obligations existed between such parties in the Period. *See* Toberoff Decl. Ex. 36 at 7 (Marvel admitting it had no written contract with Ditko in the 1960s); Ex. 5 at 371:3-25 (Stan Lee testifying that Marvel “would only buy what [it] needed”); Ex. 1 at 10, 13 (Supplemented Expert Report of Mark Evanier (“Evanier Rep.”) providing historical context giving rise to Marvel’s use of freelance creators and explaining that, when Magazine Management ran out of surplus artwork to publish, it began to purchase artwork and scripts from freelancers at a low page rate and that freelancers did not have written contracts with Magazine Management during the 1950s or 1960s and describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 14 at 10-11 (Rebuttal Expert Report of Mark Evanier (“Evanier Rebuttal Rep.”) explaining that it was not the custom and practice of Marvel or other publishers in the comic book industry to have written contracts with freelance creators during the Period); Ex. 2 at 71:17-74:5 (Larry Lieber (“Lieber”) testifying that he sold freelance work to Marvel in the 1950s and 1960s, had no contract with Marvel, and that Marvel was not obligated to buy his submitted freelance material); Ex. 3 at 159:24-160:4, 194:11-195:3, 207:12-22, 211:7-212:3 (John V.

Romita (“Romita”) testifying that he did not have a contract with Marvel as a freelancer and that freelancers were free to sell work to other publishers); Ex. 17 at 39:25-40:4, 51:20-52:4, 298:8-14, 301:14-303:7 (Thomas testifying that he had no written contract from 1965 to 1974 and that Marvel did not have contracts with freelancers prohibiting them from selling work to other publishers); Ex. 6 at 36:17-21, 202:2-20 (Thomas testifying that he had no contract with Marvel until 1974); Ex. 8 ¶ 10 (Sinnott attesting that he had no contract with Marvel and Marvel was very small and disorganized in the 1950s and 1960s); Ex. 8 ¶ 11 (Sinnott attesting that Marvel had no obligation to buy pages of his work and that Marvel paid only for the pages it wanted); Ex. 9 ¶ 8 (Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 10 ¶ 12 (Ayers attesting that he had no contract with Marvel from 1959 to 1975); Ex. 11 ¶ 9 (Colan attesting that he had no contract with Marvel until 1975); Ex. 13 ¶ 5-7 (Adams attesting that he had no contract with Marvel in the 1960s or 1970s and that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 22 at 287:22-288:12 (Lieber testifying that he had no contract with Marvel in the 1950s or 1960s); Ex. 24 at 79:2-8 (Levitz testifying that Marvel did not have contracts with any freelancer until the mid-1970s); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics); Ex. 1 at 10 (Evanier Rep. describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); *id.* at 13 (Evanier Rep. describing the common practice of independent freelancers supervising themselves and editing their own work prior to submission); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee’s *Spider-*

*Man* story ideas and characters such as, for instance, Lee’s idea for a Spider-Woman character, or Lee’s idea of making Aunt May more glamorous); Ex. 58 at 4 (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”); Ex. 3 at 219:12-24 (Romita testifying that he turned down Lee’s offer to submit material to Marvel and preferred to sell freelance work to DC Comics); Ex. 21 at 29:9-30:17 (Steranko testifying that he was not given “assignments,” but rather, he had the option to work on some books or to not if he chose not to); Ex. 24 at 89:2-11 (Levitz testifying that freelancers were free to decline “assignments”); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko plotted and drew *Spider-Man* stories completely on his own for more than one year before he left in 1966); Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue [in the balloons]); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 82 (Lee explaining in January 9, 1966 published interview: “**I don’t plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I’ll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he’s the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won’t let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I**

**fill in the dialogue. I never know what he'll come up with next**, but it's interesting to work that way.”) (emphasis added); Ex. 83 at 7 (same).

31. **Marvel's Statement:** Beginning in 1956, Marvel regularly assigned Ditko to contribute to the Marvel series entitled *Strange Tales*; he ultimately contributed to all 79 issues from February 1959 (*Strange Tales* Vol. 1, No. 67) to July 1966 (*Strange Tales* Vol. 1, No. 146), with Lee as the credited editor and writer. Lens Decl., Ex. 25 at 25-28; Lens Decl., Ex. 63 at 18-19; Thomas Decl. ¶ 12 (“Ditko was a regular contributor to the [*Strange Tales*] series in 1959 beginning with issue 67 (cover-dated February 1959).”).

**RESPONSE: Counterclaimant disputes that Ditko was “assigned” to create his works, as he had no contract with any “Marvel” entity and was free to decline any “assignment” without consequence.** See Response to Marvel's Statement 30, supra, incorporated herein by reference. See also Toberoff Decl. Ex. 3 at 219:12-24 (Romita testifying that he turned down Lee's offer to submit material to Marvel and preferred to sell freelance work to DC Comics); Ex. 21 at 29:9-30:17 (Steranko testifying that he was not given “assignments,” but rather, he had the option to work on some books or to not if he chose not to); Ex. 24 at 89:2-11 (Levitz testifying that freelancers were free to decline “assignments”); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he later started working with Marvel again, but refused to do any *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in *Spider-Man* panels for Ditko to work on, he “left [them] blank for someone else to fill in”); *id.* (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”); Ex. 17 at 298:8-14 (Thomas testifying that freelancers did not have contracts with Marvel until Thomas's in 1974, which was the first); Ex. 36 at 7 (Marvel admitting it had no written contract with Ditko in the 1960s).



32. **Marvel’s Statement:** Ditko’s contributions to the *Strange Tales* series—particularly in 1962 and 1963—generally consisted of penciling and inking discrete five-page comics that appeared at the end of the comic book—commonly referred to as “back-ups.” Lens Decl., Ex. 80 (Lee and Ditko’s five-page stories in *Strange Tales* Vol. 1, Nos. 102-109); Lens Decl., Ex. 48 at 2 (Ditko reflecting on his work for Marvel back-up features in *Strange Tales* and noting that “[t]he back-up features (5-pagers) were drawn by Don Heck, Paul Reinman and me”); Thomas Decl. ¶ 12 (“Ditko was a regular contributor to the [*Strange Tales*] series in 1959 beginning with issue 67 (cover-dated February 1959).”); Thomas Decl. ¶ 13 (explaining “*Strange Tales* comics featured five-page ‘back-up’ features written by Stan Lee and drawn by Steve Ditko”).

**RESPONSE:** Counterclaimant admits only that Ditko created, plotted, penciled, and inked five-page stories in the *Strange Tales* series in the Period, but denies Marvel’s intended inference that Ditko’s origination and creation of Dr. Strange which Ditko had been conceived long before he ever met Lee or Magazine Management was somehow at “Marvel’s” suggestion or direction. See Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko’s Dr. Strange character which began as a five-page story Ditko wrote and drew on spec introducing the character which he presented to Lee); Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea, and I figgered we’d give it a chance,” in a contemporaneous letter dated January 9, 1963); Ex. 49 at 1 (first published

appearance of Dr. Strange in *Strange Tales* No. 110); Ex. 33 (Ditko's letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an initial sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko's early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived in Johnstown, PA at the address written on the letter envelope of composite Ex. 33, and that in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as a "5-page filler," which was a great opportunity to try out all kinds of ideas like Dr. Strange, which "never fit in to Marvel's world of heroes").

33. **Marvel's Statement:** As part of his ongoing work on the *Strange Tales* series and for Marvel Comics more generally, and with Lee as the credited editor and writer, Ditko penciled and inked a five-page back-up for *Strange Tales* Vol. 1, No. 110, the issue in which Doctor Strange first appears. Lens Decl., Ex. 60 at 3 (Ditko remarking that "Dr. Strange started out as a 5 page backup"); Lens Decl., Ex. 57 at 4 (Ditko noting that it was "a mystery to [him] why no Doctor Strange covers"); Lens Decl., Ex. 27 at 3 (Lee teasing Doctor Strange as "just a 5-page filler"); Lens Decl., Ex. 33 at 3 ("It is a great pleasure and privilege for the editors of STRANGE TALES to present, quietly and without fanfare, the first of a new series, based upon a DIFFERENT kind of super-hero - - - DR. STRANGE MASTER OF BLACK MAGIC! Story: Stan Lee[;] Art: Steve Ditko[;] Lettering: Terry Szenics"); Lens Decl., Ex. 14 at 8, 11 (Lee attesting that he "(together with numerous artists) created or co-created hundreds of characters and introduced them into the story lines to be published by [Marvel] . . . [including] . . . Doctor

Strange”); *see also* Thomas Decl. ¶ 13; Lens Decl., Ex. 10 335:10-336:1; Lens Decl., Ex. 71 at 20:17-23:23; Lens Decl., Ex. 2 304:24-305:6.

**RESPONSE:** Counterclaimant disputes that Ditko merely “penciled and inked” the first Dr. Strange story, as the evidence shows that Ditko on his initiative wrote, plotted, penciled, and inked the first story featuring the Dr. Strange character he had been playing with since at least 1946. Further, Lee admitted that the *Dr. Strange* story was solely Ditko’s original conception. Counterclaimant further denies that Ditko “work[ed] ... for Marvel.” (See Counterclaimant’s Response to Marvel Statement No. 30, *supra*, incorporated herein by reference). *See also* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko’s Dr. Strange character which began as a five-page story Ditko wrote and drew on spec introducing the character which he presented to Lee); Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea, and I figgered we’d give it a chance,” in a contemporaneous letter dated January 9, 1963); Ex. 49 at 1 (first published appearance of Dr. Strange in *Strange Tales* No. 110); Ex. 33 (Ditko’s letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an initial sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko’s early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived in Johnstown, PA at

the address written on the letter envelope of composite Ex. 33, and that in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as a “5-page filler,” which was a great opportunity to try out all kinds of ideas like Dr. Strange, which “never fit in to Marvel’s world of heroes”).

34. **Marvel’s Statement:** Lee named the character Doctor Strange—“Strange” because the story was published in Marvel’s *Strange Tales* series; “Doctor” to avoid confusion with “Mr. Fantastic,” another Marvel superhero. Lens Decl., Ex. 27 at 3 (Lee writing that he “[o]riginally decided to call him MR. STRANGE, but thought the MR. bit too similar to MR. FANTASTIC—now however, I just remember we had a villain called DR. STRANGE just [ ] recently in one of our mags—hope it won’t be too confusing!”); Lens Decl., Ex. 41 at 5 (Lee recounting that “I gave him the name Doctor Strange—I think Stephen Strange; something like that. And Steve was the fellow who drew it.”).

**RESPONSE:** Admitted that Lee chose the name Doctor Strange because the original story Ditko created on spec, which Lee liked and Magazine Management purchased, would be published in its *Strange Tales* magazine. See also Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko’s Dr. Strange character which began as a five-page story Ditko wrote and drew on spec introducing the character which he presented to Lee); Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea, and I figgered we’d give it a chance,” in a contemporaneous letter dated January 9, 1963); Ex. 49 at 1 (first published

appearance of Dr. Strange in *Strange Tales* No. 110); Ex. 33 (Ditko's letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an initial sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko's early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived in Johnstown, PA at the address written on the letter envelope of composite Ex. 33, and that in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as his five page story and was a great opportunity to try out all kinds of ideas which "never fit in to Marvel's world of heroes").

35. **Marvel's Statement:** While Doctor Strange did not have a backstory when originally published, Marvel gave Doctor Strange a fleshed out personality and origin story, a doctor who undergoes a series of tests in Tibet and develops mystical abilities to combat magical forces in *Strange Tales* Vol. 1, No. 115. Lens Decl., Ex. 34 at 3 (story belatedly laying out "The ORIGIN of Doctor Strange" in response to "a flood of letters" from fans); Lens Decl., Ex. 37 at 5 (Thomas explaining that, "when Lee and Ditko gave Doctor Strange an origin in *Strange Tales* No. 115, it bore a distinct similarity to that of Lee and Kirby's Dr. Droom in *Amazing Adventures* No. 1, two years earlier"); Lens Decl., Ex. 37 at 8 (Thomas remarking that, "[s]ince the 1920s American movies, radio, comics, and the pulps had seated the Orient as the center of mysticism, and Marvel was no exception, with its first two sorcerers Strange and D[r]oom"); Lens Decl., Ex. 2 304:24-305:6 (Thomas discussing the large number of "comic book magicians" that "were all imitating the comic strip character Mandrake," and noting that "[a]lmost every company had

a couple of magicians, many of them with mustaches and capes”); Thomas Decl. ¶ 13 (first appearance of Dr. Strange “was published without a backstory”); *see also* Thomas Decl. ¶ 15.

**RESPONSE: Counterclaimant disputes that Dr. Strange “did not have a backstory when originally published,” because, while the character’s backstory was not published in *Strange Tales* No. 110, Ditko often charted out his stories well in advance in order to organize the larger narrative and plot points he would include in his stories later down the line, and so, not all of a character’s story was told in its first appearance. *See* Toberoff Decl. Ex. 1 at 12 (Evanier Rep. describing Ditko’s regular practice of maintaining a chart mapping out the future development of a character so he could introduce elements into current issues and then use those elements in issues many months down the line); Ex. 35 at DITKO-0193 (Ditko writing that he planted seeds of subplots in stories that would work their way through the issues until it was time for those sub-stories to play an active role later when the time was right); Ex. 58 at 3 (Ditko writing when he took over the *Spider-Man* stories he “knew in advance the [*Spider-Man*] story line like the best (worst) time for Aunt May to have a heart attack”).**

**Counterclaimant further denies that “Marvel gave Doctor Strange a fleshed out [*sic*] personality and origin story, a doctor who undergoes a series of tests in Tibet and develops mystical abilities to combat magical forces in *Strange Tales* Vol. 1, No. 115.” “Marvel” did not give Dr. Strange anything. This story was co-authored by Ditko and Lee, in his capacity as a freelancer and purchased by Magazine Management by the page like the other stories it published. In addition, the doctor in *Strange Tales* Vol. 1, No. 115 does not undergo a series of tests nor develops mystical abilities to combat magical forces, he resigns himself to become a student of the mystical arts. *See* Lens Decl., Ex. 34 (*Strange Tales* Vol. 1, No. 115); Counterclaimant’s Response to Marvel Statement No. 30, *supra*,**

incorporated herein by reference; Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee's common practice of composing dialogue as a freelancer, not as Marvel's editor and doing his freelance writing from home two of the five workdays per week, for which he was paid on a per-page basis as a freelancer); Ex. 3 at 41:19-42:2 (Romita testifying that Lee would stay home several days per week to write); Ex. 4 at 17:17-25 (Lee testifying that he was paid as a freelancer for his writing and was on salary for his work as an editor); Ex. 17 at 27:2-18, 30:9-13, 31:22-32:7, 276:2-14 (Thomas testifying that he was a staff writer/assistant editor in the 1960s and got a salary for that work, but separately freelanced when writing stories and was paid at a per-page rate on a separate check like other freelancers); *id.* at 289:7-291:5 (Thomas testifying that he and Lee each did their writing in a freelance capacity from home in the 1960s and would come to the office only to do their editorial work); Ex. 22 at 255:10-256:6 (Lieber testifying that Lee wrote stories and scripts as a writer, not as an editor, because writing is "not what an Editor does"); *id.* at 256:7-257:12 (Lieber testifying that Lee wrote scripts from home); Ex. 55 at 62:18-63:18 (Lee testifying that he got paid a salary as editor and separately for his writing); Ex. 56 at 91:20-92:6 (Lee testifying that he got paid a salary as editor and separately as a freelancer pre page for his writing); *id.* at 94:6-95:18 (Lee testifying that there was very little editing of his own freelance written material).

36. **Marvel's Statement:** The first issue of *Amazing Adventures*, published in June 1961, featured a five-page story entitled "I Am The Fantastic Dr. Droom," inked by Ditko. Dr. Droom was a doctor who, just like Doctor Strange, undergoes a series of tests in Tibet and develops mystical abilities to combat magical forces. Lens Decl., Ex. 26 at 3-7; Lens Decl., Ex. 40 at 5-8; Lens Decl., Ex. 25 at 3; Lens Decl., Ex. 36 at 2; Lens Decl., Ex. 41 at 5 (Lee recounting how before Doctor Strange, Marvel had "a character some years ago—I think we

called him Dr. Droom, or something—who had been a magician”); Thomas Decl. ¶ 15 (explaining “when Lee and Ditko gave Dr. Strange an origin in *Strange Tales* No. 115, it bore a distinct similarity to that of Lee and Kirby’s Dr. Droom in *Amazing Adventures* No. 1, two years earlier” in that “[b]oth characters were magicians sharing the same backstory: doctors that travel to Tibet, undergo a series of tests, and develop mystical abilities to combat magical forces”).

**RESPONSE: Counterclaimant admits that many artists and musicians of the 1960s were captivated by the mystique of the East, including India and Tibet (e.g., The Beatles, Rolling Stones, Allen Ginsburg) but disputes any implication that Dr. Strange found its roots in Dr. Droom (1961). The evidence shows that Ditko’s Dr. Strange was based on a character he had conceived as early as 1946. Moreover, Ditko’s Dr. Strange character, as he appeared in *Strange Tales* No. 110 and later issues, was a meticulously crafted synthesis of various characters and narrative elements Ditko had been tinkering with in stories he sold to Charlton Comics in the 1950s. See Toberoff Decl. Ex. 62 at 4-5 (Dr. Strange used his hands to cast teleportation and other spells in *Strange Tales* No. 139 (1965)); Ex. 63 at 2 (same in *Strange Tales* No. 126 (1964)); Ex. 70 at 8-9 (same in *Strange Tales* No. 129 (1965)); compare Ex. 61 at 3 (Ditko’s character used his hands to cast spells in 1959 in Charlton Comics’ *Space Adventures* No. 27); see also Ex. 66 at 10 (in *Strange Tales* No. 137 (1965), Dr. Strange used a device—the Eye of Agamotto—to transport through space and time); compare Ex. 65 at 4-5 (In Charlton Comics’ *Out of this World* No. 7 (1958), Ditko’s character used similar artifact to transport characters in a swirl of visual effects through space and time); see also Ex. 68 at 4-5 (in *Strange Tales* No. 122 (1964), Dr. Strange traversed through different dimensions and journeyed through alternate planes of existence); Ex. 69 at 1 (same in *Strange Tales* No. 134 (1965)); compare Ex. 67 at Cover, 4-5 (Ditko used same effect in Charlton Comics’ *Strange***



*Suspense* No. 32 (1957)); Ex. 33 (Ditko's letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an early sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko's early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived at the address written on the letter envelope of composite Ex. 33, and that, in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany).

**Counterclaimant further denies that Dr. Droom is similar to Dr. Strange. Whereas Dr. Droom gets mystical powers at the touch of a mystic's hand, Dr. Strange becomes a serious student of mystical powers in his origin story. Marvel's claim is easily refuted by the comic books themselves. Other than being doctors the two characters are completely different (e.g., Dr. Doom turns from Caucasian to Oriental). Compare** Lens Decl., Ex. 26 (Dr. Droom) *to* Lens Decl., Ex. 34 (Ditko's Dr. Strange in *Strange Tales* Vol. 1, No. 115).

37. **Marvel's Statement:** After Doctor Strange was fleshed out and given a backstory in *Strange Tales* Vol. 1, No. 115, Marvel decided to feature the character as a regular in *Strange Tales* and more broadly across other Marvel publications, with Doctor Strange appearing alongside already-established Marvel Super Heroes and villains such as Thor and Loki. Lens Decl., Ex. 32 (Thor and Loki guest-starring in *Strange Tales* Vol. 1, No. 123 with Doctor Strange); Lens Decl., Ex. 71 at 20:17-23:23 (Lee explaining how Doctor Strange was given "dramatic" expressions and characteristics like his cape and mustache but set in Greenwich Village with real-world problems, like fears of being mugged walking down the street, "juxtapos[ing] [] the supernatural with the very mundane, every day type of existence" that

Marvel characters were famous for”); Lens Decl., Ex. 71 at 3:25-6:09 (Lee explaining how Marvel’s basic “formula” was to “mix fantasy with realism” with characters that “are a little different . . . sort of like continuing soap operas”); Lens Decl., Ex. 59 at 3 (Ditko writing that Lee had “some formula approach for everything . . . [as] seen with Dr. Strange’s early Stan plots, stories”).

**RESPONSE: While Counterclaimant does not believe this is relevant to the issues in this case, Counterclaimants admits that Lee liked the Dr. Strange character and that Magazine Management continued to purchase and feature Ditko’s *Dr. Strange* stories in its publications. Counterclaimants denies Marvel attempt to inferentially co-opt Ditko’s Dr. Strange character with its citation to irrelevancies.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Dr. Strange as a character very different than any other character Marvel was publishing at the time); Ex. 25 at DITKO-0307 (Ditko explaining that Dr. Strange was a unique character who was a contradiction to Marvel’s other superheroes); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas Steve[] [Ditko’s] idea,” in a letter dated January 9, 1963); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as a 5-page story of his and was a great opportunity to try out all kinds of ideas which “never fit in to Marvel’s world of heroes”); Ex. 62 at 4-5 (Dr. Strange used his hands to cast teleportation and other spells in *Strange Tales* No. 139 (1965)); Ex. 63 at 2 (same in *Strange Tales* No. 126 (1964)); Ex. 70 at 8-9 (same in *Strange Tales* No. 129 (1965)); *compare* Ex. 61 at 3 (Ditko’s character used his hands to cast spells in 1959 in Charlton Comics’ *Space Adventures* No. 27); *see also* Ex. 66 at 10 (in *Strange Tales* No. 137 (1965), Dr. Strange used a device—the Eye of Agamotto—to transport through space and time); *compare* Ex. 65 at 4-5 (In Charlton Comics’ *Out of this World* No. 7 (1958), Ditko’s character used similar artifact to transport characters in a

swirl of visual effects through space and time); *see also* Ex. 68 at 4-5 (in *Strange Tales* No. 122 (1964), Dr. Strange traversed through different dimensions and journeyed through alternate planes of existence); Ex. 69 at 1 (same in *Strange Tales* No. 134 (1965)); *compare* Ex. 67 at Cover, 4-5 (Ditko used same effect in Charlton Comics' *Strange Suspense* No. 32 (1957)); Ex. 33 (Ditko's letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an early sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko's early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived at the address written on the letter envelope of composite Ex. 33, and that, in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany).

38. **Marvel's Statement:** Marvel never assigned Ditko to do a Doctor Strange cover and frequently had other artists ink Doctor Strange comics. Lens Decl., Ex. 53 at 3 (Ditko recounting that he "was never asked to do a Dr. Strange cover"); Lens Decl., Ex. 57 at 4 (Ditko noting that it was "a mystery to [him] why no Doctor Strange covers"); Lens Decl., Ex. 60 at 3 (Ditko criticizing the "incompetent inkers" who inked his penciled drawings for Doctor Strange); Lens Decl., Ex. 59 at 3 (Ditko lamenting that there was a "los[s] of a consistent look" for Dr. Strange because of Lee "having someone else ink" him); Lens Decl., Ex. 2 131:1-132:8 (Thomas testifying that at Marvel the inker "usually was not the same pencil," and citing Ditko's work as an example of the penciller and inker "not [being] the same person"); Lens Decl., Ex. 45 at 3 (Ditko explaining that, if he had the choice "to draw and ink or . . . [for] other people to ink [his]

pencils, he would “[r]ather do it all [him]self”); *see also* Lens Decl., Ex. 44 at 3; Decl., Ex. 55 at 4.

**RESPONSE:** Counterclaimant only admits that Ditko did not draw *Dr. Strange* covers but disputes that Magazine Management “frequently had other artists ink Doctor Strange comics.” Ditko usually insisted on inking and inked his own stories, as Marvel’s reprint payments to Ditko show that Ditko plotted, penciled, and inked many *Dr. Strange* stories. *See* Toberoff Decl. Ex. 19 at 6, “Legends at Loggerheads!” (Thomas explaining example of when Lee incorrectly dialogued a *Spider-Man* story in a way Ditko had not intended, Ditko refused to accede to Lee’s chosen direction when he got the story back to ink it); Ex. 80 (Marvel paying Ditko for reprints of numerous issues he penciled and inked); Ex. 81 (same).

39. **Marvel’s Statement:** Marvel regularly assigned Ditko to contribute to the Marvel comic book series *Amazing Fantasy*<sup>3</sup> from issue No. 1 through No. 15. Lens Decl., Ex. 4 124:3-18 (Lee describing *Amazing Fantasy* as “a book I worked on with an artist called Steve Ditko”); *see also* Lens Decl., Ex. 48 at 2; Lens Decl., Ex. 25 at 2-3.

**RESPONSE:** Counterclaimant disputes that Ditko was “assigned” to create his Works, as he had no contract with any “Marvel” entity and was free to decline any “assignment” without consequence. Marvel has not produced any contemporaneous agreement with Ditko from the Period for his creative services, nor any other evidence reflecting any bilateral rights and obligations between Ditko and Magazine Management (nor any other alleged Marvel predecessor) in the Period, nor has Marvel alleged that any such agreement or bilateral legal rights and obligations existed between such parties in the Period. *See* Toberoff Decl. Ex. 36

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<sup>3</sup> The series began as *Amazing Adventures* but was renamed twice, first as *Amazing Adult Fantasy* then again as *Amazing Fantasy*.

at 7 (Marvel admitting it had no written contract with Ditko in the 1960s); Ex. 17 at 298:8-14 (Thomas testifying that freelancers did not have contracts with Marvel until Thomas's in 1974, which was the first); Ex. 1 at 10 (Evanier Rep. describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 3 at 207:12-22 (Romita testifying that freelancers were free to sell work to other publishers); Ex. 9 ¶ 11 (Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 13 ¶¶ 5-6 (Adams attesting that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee's *Spider-Man* story ideas and characters such as, for instance, Lee's idea for a Spider-Woman character, or Lee's idea of making Aunt May more glamorous); Ex. 3 at 219:12-24 (Romita testifying that he turned down Lee's offer to submit material to Marvel and preferred to sell freelance work to DC Comics); Ex. 21 at 29:9-30:17 (Steranko testifying that he was not given "assignments," but rather, he had the option to work on some books or to not if he chose not to); Ex. 24 at 89:2-11 (Levitz testifying that freelancers were free to decline "assignments"); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he later started working with Marvel again, but refused to do any *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in *Spider-Man* panels for Ditko to work on, he "left [them] blank for someone else to fill in"); *id.* (Ditko writing that he "refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it").

40. **Marvel’s Statement:** Lee conceived of the idea for a new character named Spider-Man and devised the plot for Spider-Man’s first appearance in *Amazing Fantasy* Vol. 1, No. 15. Lens Decl., Ex. 48 at 5 (Ditko writing that “[t]he first complete Spider-Man adventure, containing the legend and story, was published in *Amazing Fantasy* #15, from Stan’s synopsis”); Lens Decl., Ex. 46 at 3 (Ditko recounting that Stan Lee “create[ed] the Spider-Man name” and provided him with a “1 or 2 page synopsis” for the first story); Lens Decl., Ex. 13 74:6-75:5 (Lee testifying about “dreaming up” the idea for Spider-Man and his superpower); Lens Decl., Ex. 10 335:10-336:11 (Lee testifying that he “came up with Spider-Man,” among other “main characters” that featured in Marvel’s comics, and that he would tell artists “how [he] wanted them done”); Lens Decl., Ex. 71 at 3:25-6:09 (Lee explaining how Marvel’s basic “formula” was to “mix fantasy with realism,” creating characters that “are a little different . . . sort of like continuing soap operas”); Lens Decl., Ex. 71 at 3:25-6:09 (Lee explaining how Spider-Man, like other Marvel characters, “juxtapos[ed] . . . bigger-than-life problem[s]” with “the very simple home life and family life”); Lens Decl., Ex. 28; *see also* Lens Decl., Ex. 14 at 8, 15.

**RESPONSE:** Counterclaimant disputes that “Lee conceived of the idea for a new character named Spider-Man” as Lee’s initial “idea” for Spider-Man was based on a character Jack Kirby and Joe Simon had created in the mid-1950s and the stark differences between Kirby’s rendition of Spider-Man and Ditko’s Spider-Man character underscores how little was actually supplied by Lee. *See* Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man’s creation and describing Kirby and Lee’s initial work on a character named “Spider-Man” that was based on an idea developed by Joe Simon in the mid-1950s); Ex. 29 at 33-34 (Ditko writing that the Spider-Man character that Lee and Kirby had originally worked up was a version of “The Fly” character created by Joe Simon); Ex. 3 at

112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko's version of the Spider-Man character); Ex. 4 at 37:3-19 (Lee testifying that he did not like Kirby's version of Spider-Man, he liked Ditko's); Ex. 29 at 34-35 (Ditko writing that the initial Kirby Spider-Man idea was tossed whereupon Ditko created a brand-new Spider-Man); Ex. 29 at 34 (Ditko comparison depiction of Kirby's and Ditko's versions of the Spider-Man character); Ex. 28 (Lee writing that Ditko was the co-creator of Spider-Man); Ex. 3 at 112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko's version of the Spider-Man character); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* stories while Ditko and Lee were not speaking); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and captions). Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* stories while Ditko and Lee were not speaking); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and captions).

41. **Marvel's Statement:** Stan Lee initially assigned Jack Kirby to pencil the artwork for Spider-Man's first appearance in *Amazing Fantasy* Vol. 1, No. 15, but because Lee was dissatisfied with Kirby's Spider-Man drawings, Lee took Kirby off the project and assigned Ditko to pencil the interior artwork and cover for *Amazing Fantasy* Vol. 1, No. 15. Lens Decl., Ex. 13 37:3-38:3 (Lee testifying that he initially "wanted Jack [Kirby] to do" the Spider-Man comic and "gave it to him" with the admonition that he "d[id]n't want this guy to be too heroic-looking"—but Kirby's penciled drawings "looked still a bit too heroic" for Lee "even though [Kirby] tried to nerd him up," so he "gave it to Steve Ditko" instead whose "style was really

more really what Spider-Man should have been”); Lens Decl., Ex. 13 334:14-18 (Lee testifying that “it was me who said, ‘I want to do a strip called Spider-Man,’ and I hired Jack, and I didn’t like it, and then I hired Ditko.”); *see also* Lens Decl., Ex. 10 376:3-15; Lens Decl., Ex. 48 at 3; Lens Decl., Ex. 54 at 4.

**RESPONSE: Counterclaimant disputes that Ditko was “assigned” to work on Spider-Man, as he had no contract with nor was employed by any “Marvel” entity and was free to decline any proposal by Lee without consequence.** Marvel has not produced any contemporaneous agreement with Ditko from the Period for his creative services, nor any other evidence reflecting any bilateral rights and obligations between Ditko and Magazine Management (nor any other alleged Marvel predecessor) in the Period, nor has Marvel alleged that any such agreement or bilateral legal rights and obligations existed between such parties in the Period. *See* Toberoff Decl. Ex. 36 at 7 (Marvel admitting it had no written contract with Ditko in the 1960s); Ex. 17 at 298:8-14 (Thomas testifying that freelancers did not have contracts with Marvel until Thomas’s in 1974, which was the first); Ex. 3 at 219:12-24 (Romita testifying that he turned down Lee’s offer to submit material to Marvel and preferred to sell freelance work to DC Comics); Ex. 21 at 29:9-30:17 (Steranko testifying that he was not given “assignments,” but rather, he had the option to work on some books or to not if he chose not to); Ex. 24 at 89:2-11 (Levitz testifying that freelancers were free to decline “assignments”); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he later started working with Marvel again, but refused to do any *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in *Spider-Man* panels for Ditko to work on, he “left [them] blank for someone else to fill in”); *id.* (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”).



Counterclaimant further disputes that Ditko merely “pencil[ed]” the interior pages, as Lee has acknowledged that Ditko was a “co-creator” of the Spider-Man character and Ditko completely originated the look, aesthetic, and gimmicks of the Spider-Man character and the *Spider-Man* stories. See Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man’s creation and describing Ditko’s creation of a very different costume and direction for the character); Ex. 3 at 112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko’s version of the Spider-Man character); Ex. 4 at 37:3-19 (Lee testifying that he did not like Kirby’s version of Spider-Man, he liked Ditko’s); Ex. 28 (Lee writing that Ditko was the co-creator of Spider-Man); Ex. 29 at 34-35 (Ditko writing that the initial Kirby Spider-Man idea was tossed and Ditko created a brand new Spider-Man); Ex. 29 at 34 (Ditko comparison depiction of Kirby’s and Ditko’s versions of the Spider-Man character); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* stories while Ditko and Lee were not speaking); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and captions).

42. **Marvel’s Statement:** Stan Lee rejected (*i.e.*, did not publish) Ditko’s cover, and, instead, re-assigned the cover artwork to Kirby such that the published cover was drawn by Kirby with the interior artwork drawn by Ditko. Lens Decl., Ex. 48 at 5 (Ditko writing that he “penciled and inked the first [Spider-Man] cover after [he] inked first story” but that “Stan rejected [his] cover” and “had Jack pencil a second, replacement cover” that “became the first published cover”); Lens Decl., Ex. 47 at 2 (Ditko admitting that “it became *publicly known and shown* that I had *previously* penciled and inked a *first* S[pider]-m[an] cover that Stan rejected”); Lens Decl., Ex. 30 at 2 (“*Amazing Fantasy* #15 unused cover art by Steve Ditko”); *see also* Lens

Decl., Ex. 28; Lens Decl., Ex. 59 at 3; Lens Decl., Ex. 61 at 4; Lens Decl., Ex. 49 at 3; Thomas Decl. ¶ 21.

**RESPONSE: Counterclaimant admits that Lee rejected, and Magazine Management declined to purchase, Ditko’s initial Spider-Man cover.**

43. **Marvel’s Statement:** After Spider-Man’s first appearance in *Amazing Fantasy* Vol. 1, No. 15, Marvel decided to give the character his own series—*The Amazing Spider-Man*—and feature him alongside already-established Marvel Super Heroes and villains, such as the Fantastic Four, the Human Torch, and the Incredible Hulk. Lens Decl., Exs. 31A at 4-5, 20-21 & 31B at 2-4 (The Fantastic Four, the Human Torch, and the Incredible Hulk guest-starring alongside Spider-Man in *The Amazing Spider-Man* Vol. 1, Nos. 1, 8, and 14); *see also* Lens Decl., Ex. 71 at 3:25-6:09 (Lee explaining how Marvel’s basic “formula” was to “mix fantasy with realism,” creating characters that “are a little different . . . sort of like continuing soap operas”).

**RESPONSE: Counterclaimant admits that Spider-Man got his own series, but disputes that he was merely featured alongside “already-established Marvel Super Heroes and villains,” as Spider-Man famously had his own comic book *The Amazing Spider-Man* published throughout the Sixties and decades thereafter (1963-1998). The evidence shows that in the Period Ditko was largely in charge of plotting (i.e., writing) the stories, and that Ditko often introduced into his *Spider-Man* stories he created character elements Ditko had created years earlier in stories he sold to Charlton Comics. *See* Toberoff Decl. Ex. 82 (Lee explaining in January 9, 1966 published interview: “I don’t plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories. I guess I’ll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he’s the genius of the world. We were arguing so**

much over plot lines I told him to start making up his own stories. **He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next**, but it's interesting to work that way.”) (emphasis added); Ex. 83 at 7 (same); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and captions); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* stories while Ditko and Lee were not speaking); Ex. 73 at 6 (Norman Osborn's first appearance in the *Spider-Man* series in 1965); Ex. 74 at 10 (Norman Osborn's identity revealed to readers in *Amazing Spider-Man* No. 37 (1966)); *compare* Ex. 75 at 1-2 (Norman Osborn's precursor—including corporate villainy and distinct curled hairstyle—in 1957 in Charlton Comics' *Strange Suspense Stories* No. 33, *Director of the Board*); *see also* Ex. 60 at 2, 8 (*Amazing Fantasy* No. 15 (1962), the issue in which Spider-Man and Ditko's Aunt May character first appeared) *compare* Ex. 79, “All Those Eyes” at 1-3 (Aunt May's forerunner character appeared in Ditko's story in Charlton Comics' *Out of this World* No. 6 (1957)); *see also* Ex. 76 at 1, 4 (Ditko's Electro character in *Amazing Spider-Man* No. 9 (1964)); *compare* Ex. 77 at 1, 4-5 (Ditko's electrically powered man, the predecessor of Electro, first appeared in Charlton Comics' *Strange Suspense Stories* No. 48 (1960)); *see also* Ex. 78 at 1, 5-6, 8-9 (Ditko introduces the Chameleon—a character who used various masks to carry out his villainy—in *Amazing Spider-Man* No. 1 (1963)); *compare* Ex. 79, “All Those Eyes” at 2-3 (Chameleon precursor—a spy character who used various masks in his espionage with a similar back story as the Chameleon—appeared in Ditko's “All Those Eyes” story he sold to Charlton Comics in 1957).

44. **Marvel's Statement:** With Stan Lee as the editor and writer, Ditko penciled every issue of *The Amazing Spider-Man* during the Time Period. Lens Decl., Ex. 25 at 3-7; Lens Decl., Exs. 31A at 4-31, 31B at 2-36, & 31C at 2-17 (comic books bearing credits reflecting Ditko as the artist and Lee as the writer and editor for all issues of *The Amazing Spider-Man*).

**RESPONSE:** Counterclaimant admits that Ditko drew every issue of *The Amazing Spider-Man* during the Period, but disputes that Lee was actually the “writer” on every issue of *The Amazing Spider-Man* in the Period. For instance, Ditko and Lee were not speaking for much of the Period relevant to Spider-Man (between first publication of *The Amazing Spiderman* (March 1963) and the end of 1965 when Ditko stopped selling to Magazine Management). During this critical Period Ditko was completely in charge of writing and drawing (penciling) the *Spider-Man* stories (and the *Dr. Strange* stories), with Lee left merely to dialogue the balloons and finalize captions based on Ditko's notes and directions. See Toberoff Decl. Ex. 82 (Lee explaining in January 9, 1966 published interview: “I don't plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories. I guess I'll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he's the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next, but it's interesting to work that way.”) (emphasis added); Ex. 83 at 7 (same); Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko's practice of submitting detailed notes with his freelance material to assist Lee in dialoguing the stories); Ex. 7 at 223:18-225:20 (Thomas testifying that Ditko refused to speak to Lee while working on *Spider-Man* and *Dr. Strange* so all plotting on the stories was done by Ditko, and further, that Ditko would provide margin notes to

indicate what he intended to happen in the story to guide Lee when Lee dialogued the story); *id.* at 262:4-264:19 (Thomas testifying that when he began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 17 at 84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); *id.* at 311:18-312:25 (Thomas testifying that Ditko, on his own, plotted and drew *Spider-Man* for more than one year before he left in 1966, did not work pursuant to the Marvel Method, and that Lee would not even know anything about the story until it was penciled and submitted by Ditko); Ex. 18 (1965 example of Ditko's *Dr. Strange* margin notes for Thomas); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue [in the balloons]); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 19 at 6-8 (Thomas interview explaining that Ditko and Lee were not speaking in 1965 and Ditko was plotting both *Spider-Man* and *Dr. Strange* and would only come to the office to drop work off with Brodsky); Ex. 28 (Lee writing that Ditko was the co-creator of *Spider-Man* and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and some captions); Ex. 24 at 124:5-24 (Levitz testifying that Ditko and Lee stopped speaking in the last year of Ditko's time with Marvel because Ditko was not getting proper credit for his contributions to the stories); Ex. 35 at DITKO-0193 (Ditko writing that he and Lee stopped speaking around 1964); Ex. 58 at 3 (Ditko writing that he took over all plotting of the *Spider-Man* stories).

Counterclaimant further disputes that Ditko merely “penciled” the *Spider-Man* stories, when in fact, Ditko often created and always plotted the stories which is a literary function. The evidence reflected that Ditko also created numerous supporting characters and repurposed character types in the *Spider-Man* stories that he had created years prior in stories Ditko sold to Charlton Comics like Aunt May, Electro, Norman Osborn, and the Chameleon. See Toberoff Decl. Ex. 73 at 6 (Norman Osborn’s first appearance in the *Spider-Man* series in 1965); Ex. 74 at 10 (Norman Osborn’s identity revealed to readers in *Amazing Spider-Man* No. 37 (1966)); compare Ex. 75 at 1-2 (Norman Osborn’s precursor—including corporate villainy and distinct curled hairstyle—in 1957 in Charlton Comics’ *Strange Suspense Stories* No. 33, *Director of the Board*); see also Ex. 60 at 2, 8 (*Amazing Fantasy* No. 15 (1962), the issue in which Spider-Man and Ditko’s Aunt May character first appeared) compare Ex. 79, “All Those Eyes” at 1-3 (Aunt May’s forerunner character appeared in Ditko’s story in Charlton Comics’ *Out of this World* No. 6 (1957)); see also Ex. 76 at 1, 4 (Ditko’s Electro character in *Amazing Spider-Man* No. 9 (1964)); compare Ex. 77 at 1, 4-5 (Ditko’s electrically powered man, the predecessor of Electro, first appeared in Charlton Comics’ *Strange Suspense Stories* No. 48 (1960)); see also Ex. 78 at 1, 5-6, 8-9 (Ditko introduces the Chameleon—a character who used various masks to carry out his villainy—in *Amazing Spider-Man* No. 1 (1963)); compare Ex. 79, “All Those Eyes” at 2-3 (Chameleon precursor—a spy character who used various masks in his espionage with a similar back story as the Chameleon—appeared in Ditko’s “All Those Eyes” story he sold to Charlton Comics in 1957); Ex. 82 (Lee explaining in January 9, 1966 published interview: “**I don’t plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I’ll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he’s the genius of the world. We were arguing so much over plot lines I told him to start

making up his own stories. **He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next**, but it's interesting to work that way.") (emphasis added); Ex. 83 at 7 (same).

Lee, who was in charge of inserting credits on the comic book covers, publicly and contemporaneously credited Ditko with taking over plotting of the *Spider-Man* and *Dr. Strange* stories beginning at least with issues *Amazing Spider-Man* # 25 and *Strange Tales* # 135, respectively. See Toberoff Decl. Ex. 82 (Lee explaining in January 9, 1966 published interview: **"I don't plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I'll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he's the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next**, but it's interesting to work that way.") (emphasis added); Ex. 83 at 7 (same); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: "Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it's full of unexpected surprises!"); Ex. 72 at 225 (*Strange Tales* No. 135: "Plotted and Illustrated by Fandom's Favorite Fiend: Steve Ditko").

45. **Marvel's Statement:** Marvel kept Ditko busy so that he—like other freelancers—performed much of his work for Marvel during the Time Period. Lens Decl., Ex. 25 (reflecting Ditko's work for Marvel from the 1950s to 1990s); Lens Decl., Ex. 15 19:1-10 (Lee testifying that "there were a few artists that [he] worked with more than others," including Ditko); Lens Decl., Ex. 2 144:22-145:22 (Thomas testifying as to Lee's practice of "keep[ing] [freelancers] busy" so that they "always had work at hand and didn't have much downtime

where they weren't making any money"); Lens Decl., Ex. 2 316:1-10 (Thomas testifying that Lee employed the Marvel Method to "keep [artists] busy by giving them a plot . . . that way the artist didn't have the downtime and lose money"); *see also* Lens Decl., Ex. 72 at 4 (recalling Ditko toiling at his artist's desk in the early 1960s "tortured by [] deadlines"); Lens Decl., Ex. 73 at 3 (Ditko noting that Kirby was "buried under work" and needed to work fast "to keep up with the assignments Lee was throwing at him"); Thomas Decl. ¶¶ 16-17 ("I understood that Steve Ditko was performing most, if not all, of this work for Marvel").

**RESPONSE: Counterclaimant admits that Ditko regularly submitted freelance material to Magazine Management in the Period, but notes that Ditko was regularly submitting material to other publishers, including Charlton Comics as well.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. describing Ditko's common practice of selling freelance work to various publishers during the Period); Ex. 12 ¶ 18 (Evanier attesting that Ditko was submitting freelance *Spider-Man* material to Marvel but was also selling work to Charlton Comics at the same time); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics); Ex. 3 at 207:12-22 (Romita testifying that freelancers were free to sell work to other publishers); Ex. 9 ¶ 11 (Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 13 ¶¶ 5-6 (Adams attesting that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 17 at 298:8-14, 301:14-303:7



(Thomas testifying that Marvel did not have contracts with freelancers prohibiting them from selling work to other publishers).

46. **Marvel’s Statement:** Ditko performed his work for Marvel primarily under the “Marvel Method.” Lens Decl., Ex. 48 at 2 (Ditko describing his working method with Stan Lee on *Amazing Adult Fantasy* in 1961); Lens Decl., Ex. 52 at 4 (Ditko writing that he “had an issue/monthly sheet”); Lens Decl., Ex. 46 at 3 (Ditko explaining that Stan Lee “create[ed]” the “Spider-Man” name and then wrote the original “synopsis for the artist [(i.e., Ditko)]”); Lens Decl., Ex. 2 312:1-5 (“Stan and Steve had worked in the usual way. They would get together, talk over the story. And then whatever Stan finally approved that Steve should do, Steve would go home and start drawing.”); Lens Decl., Ex. 2 314:10-12 (Thomas testifying that Ditko’s work with Lee was “a version of the Marvel method”); Lens Decl., Ex. 9 18:9-13 (Lieber testifying that “there was usually one story for Ditko in the books and Stan liked to write that himself, so he made it up and he worked with Ditko”); Lens Decl., Ex. 13 20:7-21:25 (Lee testifying about the Marvel Method, using Ditko as an example).

**RESPONSE:** Counterclaimant disputes that Ditko submitted material under any purported Marvel “method” as Ditko was fiercely independent, rejected Lee’s input, refused to make changes to his work. In fact, that is why Lee stopped communicating with Ditko for much of the Period, and when Ditko was in complete control over his stories. Moreover, Ditko originated the *Dr. Strange* character completely on spec, and others like Aunt May, Norman Osborn, Electro, and the Chameleon on his own years prior, and not pursuant to any trumpeted “Marvel Method.” See Toberoff Decl. Ex. 82 (Lee explaining in January 9, 1966 published interview: “I don’t plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories. I guess I’ll leave him alone until sales start to slip. Since

Spidey got so popular, Ditko thinks he's the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next**, but it's interesting to work that way.") (emphasis added); Ex. 83 at 7 (same); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); *id.* at 262:4-264:19 (Thomas testifying that, when Thomas began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: "Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it's full of unexpected surprises!"); Ex. 72 at 225 (*Strange Tales* No. 135: "Plotted and Illustrated by Fandom's Favorite Fiend: Steve Ditko"); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko, on his own, plotted and drew *Spider-Man* for more than one year before he left in 1966, did not work pursuant to the Marvel Method, and that Lee would not even know anything about the story until it was penciled and submitted by Ditko); *id.* at 84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); Ex. 19 at 6-8 (Thomas interview explaining that Ditko and Lee were not speaking in 1965 and Ditko was plotting both *Spider-Man* and *Dr. Strange* and would only come to the office to drop work off with Brodsky); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he

plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 28 (Lee writing that Ditko was the co-creator of Spider-Man and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and some captions); Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko's practice of refusing to make changes and in such case, Marvel's custom of having staff make such changes after the work had been submitted to and purchased by Marvel); *id.* at 11, 13 (Evanier Rebuttal Rep. explaining the custom and practice of comic book publishers to reserve the right to purchase or not purchase freelancers' submitted material, and that freelancers were free to decline to make changes to their work); Ex. 3 at 75:18-20, 243:13-244:23, 246:5-9 (Romita testifying that he, or someone else Lee could find in the Marvel office, would be asked to make changes to other artists' work after it had been submitted and would not be paid any extra for making these changes and noting specifically that when Lee did not like something on a Ditko cover, he asked Kirby to change it); Ex. 19 at 6, "Legends at Loggerheads!" (Thomas explaining example of when Lee incorrectly dialogued a *Spider-Man* story in a way Ditko had not intended, Ditko refused to accede to Lee's chosen direction); Ex. 21 at 41:7-18 (Steranko testifying that Marvel had production assistants to make changes to work after it had been submitted by artists); Ex. 35 at DITKO-0193 (Ditko writing that he ignored comments from Lee and Brodsky and only made changes to stories when he agreed with them); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee's *Spider-Man* story ideas and characters such as, for instance, Lee's idea for a Spider-Woman character, or Lee's idea of making Aunt May more glamorous); Ex. 58 at 4 (Ditko writing that he "refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it"); Ex. 25 (Ditko: "Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories,

writing, [and] art.”); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue to the balloons); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 35 at DITKO-0189 (Ditko writing that he left Marvel in 1966); *id.* at DITKO-0193 (Ditko writing that he and Lee stopped speaking around 1964 and thus from then on, Ditko had complete creative control of the *Spider-Man* and *Dr. Strange* stories, which he was plotting and penciling until he left in 1966); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea,” in a contemporaneous letter dated January 9, 1963 and noting the story was a “5-page filler”); Ex. 33 (Ditko’s letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an early sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko’s early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived at the address written on the letter envelope of composite Ex. 33, and that, in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany); Ex. 62 at 4-5 (Dr. Strange used his hands to cast teleportation and other spells in *Strange Tales* No. 139 (1965)); Ex. 63 at 2 (same in *Strange Tales* No. 126 (1964)); Ex. 70 at 8-9 (same in *Strange Tales* No. 129 (1965)); *compare* Ex. 61 at 3 (Ditko’s character used his hands to cast spells in 1959 in Charlton Comics’ *Space Adventures* No. 27); *see also* Ex. 66 at 10 (in *Strange Tales* No. 137 (1965), Dr. Strange used a device—the Eye of Agamotto—to transport through space and time); *compare* Ex. 65 at 4-5 (In Charlton Comics’ *Out of this World* No. 7 (1958), Ditko’s character used similar artifact to transport characters in a

swirl of visual effects through space and time); *see also* Ex. 68 at 4-5 (in *Strange Tales* No. 122 (1964), Dr. Strange traversed through different dimensions and journeyed through alternate planes of existence); Ex. 69 at 1 (same in *Strange Tales* No. 134 (1965)); *compare* Ex. 67 at Cover, 4-5 (Ditko used same effect in Charlton Comics' *Strange Suspense* No. 32 (1957)); *see also* Ex. 73 at 6 (Norman Osborn's first appearance in the *Spider-Man* series in 1965); Ex. 74 at 10 (Norman Osborn's identity revealed to readers in *Amazing Spider-Man* No. 37 (1966)); *compare* Ex. 75 at 1-2 (Norman Osborn's precursor—including corporate villainy and distinct curled hairstyle—in 1957 in Charlton Comics' *Strange Suspense Stories* No. 33, *Director of the Board*); *see also* Ex. 60 at 2, 8 (*Amazing Fantasy* No. 15 (1962), the issue in which Spider-Man and Ditko's Aunt May character first appeared) *compare* Ex. 79, "All Those Eyes" at 1-3 (Aunt May's forerunner character appeared in Ditko's story in Charlton Comics' *Out of this World* No. 6 (1957)); *see also* Ex. 76 at 1, 4 (Ditko's Electro character in *Amazing Spider-Man* No. 9 (1964)); *compare* Ex. 77 at 1, 4-5 (Ditko's electrically powered man, the predecessor of Electro, first appeared in Charlton Comics' *Strange Suspense Stories* No. 48 (1960)); *see also* Ex. 78 at 1, 5-6, 8-9 (Ditko introduces the Chameleon—a character who used various masks to carry out his villainy—in *Amazing Spider-Man* No. 1 (1963)); *compare* Ex. 79, "All Those Eyes" at 2-3 (Chameleon precursor—a spy character who used various masks in his espionage with a similar back story as the Chameleon—appeared in Ditko's "All Those Eyes" story he sold to Charlton Comics in 1957).

47. **Marvel's Statement:** After gaining experience working with Marvel, Marvel afforded Ditko (like Jack Kirby) more artistic discretion, subject always to Marvel's (*i.e.*, Goodman's and Lee's) ultimate authority. Lens Decl., Ex. 15 19:1-10 (Lee testifying that "there were a few artists that [he] worked with more than others," including Ditko); Lens Decl., Ex. 45

at 4 (Ditko explaining in 1965 that he was “*allowed* to drift” from his assigned scripts) (emphasis added); Lens Decl., Ex. 25 (reflecting Ditko’s work for Marvel from the 1950s to 1990s); Lens Decl., Ex. 48 at 2 (Ditko explaining how *Amazing Adventures* “came about because of the 5-page twist-ending stories we [Lee and Ditko] had done as back-ups in *Strange Tales*” and others); Lens Decl., Ex. 2 307:25-308:3 (Thomas testifying that *Amazing Fantasy* was comprised of little short stories by – written by Stan Lee and drawn by Steve Ditko entirely”); Lens Decl., Ex. 4 124:3-18 (Lee testifying about his collaboration with Ditko on *Amazing Fantasy*); *see also* Lens Decl., Ex. 45 at 4.

**RESPONSE: Counterclaimant admits that Magazine Management had authority over what it would purchase and what it would publish, as does any publisher, but disputes that it had any “authority” over Ditko, as Ditko was an independent freelance artist with whom “Marvel” specifically avoided any contractual relationship.** Marvel has not produced any contemporaneous agreement with Ditko from the Period for his creative services, nor any other evidence reflecting any bilateral rights and obligations between Ditko and Magazine Management (nor any other alleged Marvel predecessor) in the Period, nor has Marvel alleged that any such agreement or bilateral legal rights and obligations existed between such parties in the Period. *See* Toberoff Decl. Ex. 17 at 298:8-14 (Thomas testifying that freelancers did not have contracts with Marvel until Thomas’s in 1974, which was the first); Ex. 36 at 7 (Marvel admitting it had no written contract with Ditko in the 1960s); Ex. 24 at 89:2-11 (Levitz testifying that freelancers were free to decline “assignments”); Ex. 1 at 10 (Evanier Rep. describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 3 at 207:12-22 (Romita testifying that freelancers were free to sell work to other publishers); Ex. 9 ¶ 11 (Steranko attesting that Marvel had no contract

with Steranko and so he was free to sell work to other publishers); Ex. 13 ¶¶ 5-6 (Adams attesting that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee's *Spider-Man* story ideas and characters such as, for instance, Lee's idea for a Spider-Woman character, or Lee's idea of making Aunt May more glamorous); Ex. 3 at 219:12-24 (Romita testifying that he turned down Lee's offer to submit material to Marvel and preferred to sell freelance work to DC Comics); Ex. 21 at 29:9-30:17 (Steranko testifying that he was not given "assignments," but rather, he had the option to work on some books or to not if he chose not to); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he later started working with Marvel again, but refused to do any *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in *Spider-Man* panels for Ditko to work on, he "left [them] blank for someone else to fill in"); *id.* (Ditko writing that he "refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it"); Ex. 82 (Lee explaining in January 9, 1966 published interview: **"I don't plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories. I guess I'll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he's the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next, but it's interesting to work that way."**) (emphasis added); Ex. 83 at 7 (same); Ex. 1 at 10 (Evanier Rep. describing the

common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 3 at 207:12-22 (Romita testifying that freelancers were free to sell work to other publishers); Ex. 9 ¶ 11 (Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 13 ¶¶ 5-6 (Adams attesting that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 17 at 298:8-14, 301:14-303:7 (Thomas testifying that Marvel did not have contracts with freelancers prohibiting them from selling work to other publishers); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee’s *Spider-Man* story ideas and characters such as, for instance, Lee’s idea for a Spider-Woman character, or Lee’s idea of making Aunt May more glamorous); Ex. 58 at 4 (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko plotted and drew *Spider-Man* stories completely on his own for more than one year before he left in 1966); Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue [in the balloons]); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 71 at 159 (*Amazing Spider-Man* No. 25: “Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it’s full of unexpected surprises!”); Ex. 72 at 225 (*Strange Tales* No. 135: “Plotted and Illustrated by Fandom’s Favorite Fiend: Steve Ditko”).

48. **Marvel’s Statement:** During the relevant period, Marvel did not purchase any work “on spec” from Ditko or any other freelancer. Lens Decl., Ex. 2 152:1-154:7 (Thomas



testifying that he could not “think of any instances” in which “artists start[ed] working on pages for a comic before discussing the plot or synopsis with Stan or the writer,” or, more specifically, in which Ditko “submitted artwork to Marvel for an existing comic book series that he hadn’t been assigned to,” or otherwise sold plots, synopses, scripts, dialogue, artwork, or characters “on spec” to Marvel); Lens Decl., Ex. 12 56:12-15 (Thomas testifying that artists did not “start working on pages before discussing the plot or synopsis with Stan or the writer”); Lens Decl., Ex. 12 57:25-58:9 (Thomas confirming that he was not “aware of any instance where a writer came in and actually started working on a new series before Stan said: Go ahead and write the series,” nor was he “aware of any instances where an artist began work on a comic book issue before getting the assignment to do the issue from Stan”); Lens Decl., Ex. 12 58:14-23 (Thomas confirming that, during the relevant period, Marvel did not “ever buy any work created on spec by freelance artists”); Lens Decl., Ex. 7 217:13-21 (same); Lens Decl., Ex. 13 41:20-42:9 (Lee testifying that he could not recall “Marvel ever buy[ing] work that was created by one of the writers or freelancers on spec as opposed to having the material being part of an assignment that [Lee] would give him” during the Time Period); Lens Decl., Ex. 10 383:18-21 (Lee confirming that Jack Kirby did not “ever begin work on a book published by Marvel before [Lee] had assigned him that work”); Lens Decl., Ex. 6 38:8-21 (Lee confirming that he could not “recall any comic book that Marvel published prior to 1972 . . . that was created other than pursuant to a specific assignment by an editor to a writer and an artist”—at least, in Marvel’s “regular comics”).

**RESPONSE:** Counterclaimant disputes that Marvel did not purchase any freelance material “on spec,” as, for example, Ditko created the first Dr. Strange story “on spec” and more generally, Marvel reserved the right to reject and not pay for submitted freelance

material (and not pay for redrawing) after Ditko had invested significant time and resources, and thus, by definition, Ditko created his freelance material with no contractual or financial guarantee—and thus, “on spec.” Whether Ditko was paid for his pages more often than not is unknown but, in any event, irrelevant to the legal reality of the circumstances under which he created his material. *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko’s Dr. Strange character which began as a five-page story Ditko wrote and drew on spec introducing the character which he presented to Lee); Ex. 25 (Ditko: “Dr. Strange has always been a contradiction to Marvel heroes ... He is my creation, and at one point I took over all stories, writing, [and] art.”); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea,” in a contemporaneous letter dated January 9, 1963 and noting the story was a “5-page filler”); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as a “5-page filler,” which was a great opportunity to try out all kinds of ideas like Dr. Strange, which “never fit in to Marvel’s world of heroes”); Ex. 33 (Ditko’s letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an early sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko’s early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived at the address written on the letter envelope of composite Ex. 33, and that, in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany); Ex. 17 at 295:8-296:8, 297:1-20 (Thomas testifying that Marvel

could accept or reject submitted freelance material in its sole discretion); Ex. 15 at 22-23 (Levitz Rep. explaining that it was the custom and practice for comic book publishers to have the right to reject work submitted by freelancers and to pay only for the pages which were accepted); Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel's custom and practice of not paying freelancers for material they rejected); Ex. 14 at 3, 7 (Evanier Rebuttal Rep. explaining the custom and practice in the comic book industry in the Period, including at Marvel, to not pay for any freelance material rejected by the publishers); Ex. 10 ¶ 11 (Ayers attesting that was not paid for rejected material or for having to redo material); Ex. 11 ¶ 9 (Colan attesting that Marvel only paid for the pages it accepted); Ex. 13 ¶¶ 8, 10-11 (Adams attesting that he bore the risk of creation because there was no guarantee his work would be purchased by Marvel); Ex. 16 at 117:6-121:4 (Solo testifying that Colan was not paid for rejected work and that her father was so upset by this periodic waste of his efforts that he would commonly use the rejected, unpaid-for pages of artwork to pick up their family dog's feces); Ex. 20 at 73:14-74:24 (Evanier testifying that Marvel had asked Evanier to submit some work in the 1970s prior to 1978, for a new magazine, but that after he did the work, Marvel declined to buy it or pay for it since it decided not to publish the magazine after all); Ex. 21 at 29:9-30:17 (Steranko testifying that Lee sometimes rejected the work Steranko submitted on spec); Ex. 2 at 100:3-101:9 (Lieber testifying about a time he witnessed Kirby's work being rejected and Kirby tearing up and throwing away the rejected pages); Ex. 22 at 155:17-156:4, 259:5-16, 267:5-269:21 (Lieber testifying that he was only paid for work that was accepted by Marvel and recalls at least one instance where he submitted a plot which Marvel rejected and did not pay for); Ex. 24 at 14:12-19, 104:16-105:11 (Levitz testifying that Marvel had the right to reject material and not pay for it); Ex. 43 ¶ 3(a) (Marvel's contract with Colan dated March 22, 1975 providing that Colan

would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel’s contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel’s contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel’s October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber “will make all changes and rework all Material ... without charge”).

49. **Marvel’s Statement:** Marvel paid a flat, per-page rate to Ditko for his work on Marvel assignments, as it did with other freelancers. Lens Decl., Ex. 2 141:25-142:15 (Thomas testifying that freelance writers, artists, pencilers, inkers, letterers, and colorists all were paid by Marvel on a per-page rate); Lens Decl., Ex. 4 125:15-18 (Lee confirming that, to his recollection, Ditko was paid a per-page rate “for his contribution to . . . Spider-Man”); Lens Decl., Ex. 2 292:18-293:4 (Thomas explaining Marvel’s per-page rate system, in that compensation “was based entirely on the page, whether it took ten minutes to write or an hour to write or five hours to write”); Lens Decl., Ex. 2 332:23-333:4 (Thomas testifying that he understood that Marvel had “always” used “a page rate kind of system for writers and for artists” during the Time Period); Lens Decl., Ex. 13 30:11-14 (Lee confirming that freelancers “were paid on a per page rate” during the Time Period); Lens Decl., Ex. 13 58:13-21 (same as to Jack Kirby); Lens Decl., Ex. 39 at 5 (Thomas recounting that the day Ditko quit Marvel, noting that Marvel production manager Sol Brodsky “had a memo on his desk for a \$5 a page raise for Steve, which was fairly substantial for 1965”); Lens Decl., Ex. 57 at 3 (Ditko writing “What I did with Spider-man, I was paid for. Marvel’s property.”); Lens Decl., Ex. 68A-G (freelance writer Don Heck’s payment

ledger reflecting extensive entries on per-page basis for his work for “Mag. Management,” “Maga. Management,” “Magazine Management,” and “Marvel” from 1954 to 1972 and intermittently until 1994, when all entries end); Lens Decl., Ex. 2 137: 8-16 (Thomas testifying that he was “paid on a per-page basis for [his] freelance writing assignments from Marvel”); Lens Decl., Ex. 10 396:1-10 (Lee testifying that for his work as a writer, he “was paid on a freelance basis, like any freelancer writer . . . paid by the page”); Lens Decl., Ex. 6 40:14-20 (Lee testifying that as a writer he was paid “[p]er page on a freelancer basis like all the other writers.”); *see also* Lens Decl., Ex. 2 276:7-23; Lens Decl., Ex. 3 152:5-8, 152:25-153:10, 175:7, 226:7-11, 249:7-9, 258:12-17, 290:2-5, 290:18-22; Thomas Decl. ¶ 20.

**RESPONSE:** Counterclaimant disputes Marvel’s use of the term “assignments,” and further notes that Marvel *purchased* material from Ditko. *See* Counterclaimant’s Response to Marvel’s Statement 47 incorporated herein by reference. *See also* Toberoff Decl. Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel’s custom and practice of purchasing freelance work by the page, and not paying freelancers fixed wages or for their services or time); Ex. 14 at 3 (Evanier Rebuttal Rep. explaining the custom and practice of comic book publishers in the Period, including at Marvel, to pay for only those pages they chose to accept and purchase, and to not pay for a freelancer’s time or services); Ex. 8 ¶ 11 (Sinnott attesting that Marvel only paid him for the pages it accepted); Ex. 9 ¶ 14 (Steranko attesting that he was only paid for the pages Marvel accepted); Ex. 10 ¶ 11 (Ayers attesting that he was paid per page for freelance material which Marvel accepted); Ex. 13 ¶¶ 9-11 (Adams attesting that Marvel only paid him for pages which it accepted); Ex. 17 at 292:24-293:15 (Thomas testifying that freelancers were only paid for the final, accepted page); Ex. 43 ¶ 3(a) (Marvel’s contract

with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel's contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel's contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel's October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber "will make all changes and rework all Material ... without charge").

50. **Marvel's Statement:** Marvel paid Ditko, like other freelancers, his per-page rate for his work even if Marvel required changes or did not ultimately publish the pages. Lens Decl., Ex. 2 142:21-143:15 (Thomas testifying that Marvel paid "a flat rate" and "didn't generally pay extra for revisions."); Lens Decl., Ex. 2 158:17-20 (Thomas testifying that he recalled "a few instances" where "Marvel paid an artist their per-page rate for their artwork but decided not to publish it"); Lens Decl., Ex. 2 297:14-20 (Thomas testifying that Marvel would pay out its per-page rates "if a new page came in that they accepted"); Lens Decl., Ex. 12 68:24-69:6 (Thomas testifying that "if an artist's work required that changes be made, [] the artist have been paid for the original work that they submitted"); Lens Decl., Ex. 12 74:19-25 (Thomas testifying that he was still paid for "any materials that [he] submitted in [his] freelance capacity that were modified by Stan"); Lens Decl., Ex. 13 18:6-16 (Lee testifying that "[e]ven if we didn't publish – if an artist drew a 10-page story, and the artist rate was \$20 a page, I would put in a voucher for \$200 for that artist. Now, if – and this happened rarely – but if we decided not to use that story, the artist would still keep the money because he had done the work. It wasn't his

fault. . . . Everybody was paid per page.”); Lens Decl., Ex. 10 376:16-22 (Lee testifying that “[a]ny artists that drew anything that I had asked him or her to draw at my behest, I paid them for it. If it wasn’t good, we wouldn’t use it. But I asked them to draw it, so I did pay them.”); Lens Decl., Ex. 9 30:10-12 (Lieber testifying that he “g[o]t paid for all the work [he] did for Marvel”); Lens Decl., Ex. 68A-G (reflecting number of pages and payment amount for work on various Marvel series); *compare* Lens Decl., Ex. 35 at 9 (Thomas noting that Gil Kane was assigned to and did pencil and ink the cover of *Avengers* #37), *with* Lens Decl., Ex. 68D at 10 (reflecting payment to Don Heck for “*Avengers* #37 P&I cover”); Lens Decl., Ex. 35 at 12 (“*The Avengers* #37 unused cover art by Don Heck”).

**RESPONSE: Counterclaimant admits that Magazine Management would only pay for the final page of submitted freelance material it decided to purchase, and that it would not pay for any requested changes or do-overs and would not pay for pages it rejected. There may be instances where Magazine Management accepted and purchased freelance pages for publication but thereafter decided not to publish those pages, but the publisher was crystal clear that it would not pay for material it rejected or for material it wanted to be redone, all in its sole discretion. See Toberoff Decl. Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 15 at 22-23 (Levitz Rep. explaining that it was the custom and practice for comic book publishers to have the right to reject work submitted by freelancers and to pay only for the pages which were accepted); Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel’s custom and practice of purchasing freelance work by the page, and not paying freelancers fixed wages or for their services or time); Ex. 14 at 3 (Evanier Rebuttal Rep. explaining the custom and practice of comic book publishers in the Period, including at Marvel, to pay for only those pages they chose to accept and purchase, and**

to not pay for a freelancer's time or services); Ex. 8 ¶ 11 (Sinnott attesting that Marvel only paid him for the pages it accepted); Ex. 9 ¶ 14 (Steranko attesting that he was only paid for the pages Marvel accepted); Ex. 10 ¶ 11 (Ayers attesting that he was paid per page for freelance material which Marvel accepted); Ex. 13 ¶¶ 9-11 (Adams attesting that Marvel only paid him for pages which it accepted); Ex. 17 at 292:24-293:15 (Thomas testifying that freelancers were only paid for the final, accepted page); Ex. 43 ¶ 3(a) (Marvel's contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel's contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel's contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel's October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber "will make all changes and rework all Material ... without charge"); Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel's custom and practice of not paying freelancers for material they rejected); Ex. 14 at 3, 7 (Evanier Rebuttal Rep. explaining the custom and practice in the comic book industry in the Period, including at Marvel, to not pay for any freelance material rejected by the publishers); Ex. 2 at 100:3-101:9 (Lieber testifying about a time he witnessed Kirby's work being rejected and Kirby tearing up and throwing away the rejected pages); Ex. 10 ¶ 11 (Ayers attesting that was not paid for rejected material or for having to redo material); Ex. 11 ¶ 9 (Colan attesting that Marvel only paid for the pages it accepted); Ex. 13 ¶¶ 8, 10-11 (Adams attesting that he bore the risk of creation because there was no guarantee his work would be purchased by Marvel); Ex. 16 at 117:6-121:4 (Solo testifying that Colan was



not paid for rejected work and that her father was so upset by this periodic waste of his efforts that he would commonly use the rejected, unpaid-for pages of artwork to pick up their family dog's feces); Ex. 17 at 295:8-296:8, 297:1-20 (Thomas testifying that Marvel could accept or reject submitted freelance material in its sole discretion); Ex. 20 at 73:14-74:24 (Evanier testifying that Marvel had asked Evanier to submit some work in the 1970s prior to 1978, for a new magazine, but that after he did the work, Marvel declined to buy it or pay for it since it decided not to publish the magazine after all); Ex. 21 at 29:9-30:17 (Steranko testifying that Lee sometimes rejected the work Steranko submitted on spec); Ex. 22 at 155:17-156:4, 259:5-16, 267:5-269:21 (Lieber testifying that he was only paid for work that was accepted by Marvel and recalls at least one instance where he submitted a plot which Marvel rejected and did not pay for); Ex. 24 at 14:12-19, 104:16-105:11 (Levitz testifying that Marvel had the right to reject material and not pay for it); Ex. 43 ¶ 3(a) (Marvel's contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel's contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel's contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel's October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber "will make all changes and rework all Material ... without charge"); Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel's custom and practice of not paying freelancers to revise or redraw a page, as freelancers were only paid for the final pages the publisher decided to accept and purchase); Ex. 14 at 7 (Evanier Rebuttal Rep. explaining the custom and practice in

the comic book industry, including at Marvel, for publishers to not pay for rejected material, or to pay a freelancer to make revisions to his material); Ex. 2 at 102:15-105:17 (Lieber testifying he was not paid for redoing work and that he was only paid for the final pages Marvel accepted); Ex. 8 ¶ 13 (Sinnott attesting that Marvel only paid for the final pages that were sold to Marvel, not for any changes or rejected work); Ex. 9 ¶ 14 (Steranko attesting he was not compensated for having to redo any work); Ex. 10 ¶ 11 (Ayers attesting that he was not paid for rejected material or for having to redo material); Ex. 11 ¶¶ 9, 11 (Colan attesting that Marvel did not pay him for redoing work); Ex. 13 ¶¶ 10-11 (Adams attesting that he was only paid for pages Marvel accepted); Ex. 17 at 142:21-143:15, 296:10-25 (Thomas testifying that freelancers were not paid for having to redo or revise pages and that they would only be paid for the final, accepted page).

51. **Marvel’s Statement:** As with other freelancers, Marvel did not pay royalties or provide profit participation to Ditko. Lens Decl., Ex. 2 139:24-140:20 (Thomas testifying that he did not “receive royalties” or “profit participati[on]” for his Marvel work in the 1960s and 1970s); Lens Decl., Ex. 2 142:16-20 (Thomas testifying that he “was not aware” of any 1960s Marvel freelancers “receiving royalties or profit participation”); Lens Decl., Ex. 7 225:17-226:20 (Thomas testifying that he was “typically paid before the issue hit the stands” and he and other Marvel freelancers were paid “the same page rate regardless of whether the issue they worked on ultimately sold well or not” as Marvel had a “straight page rate system”); Lens Decl., Ex. 13 42:21-43:2 (Lee testifying that Marvel freelance artists “g[o]t paid whether or not a particular book or comic was successful” as “[t]hey were paid when they delivered the artwork”); Lens Decl., Ex. 13 45:4-9 (Lee testifying that he “d[id]’t remember any royalties”); Lens Decl., Ex. 6 34:22-35:7 (Lee testifying that “[i]t wasn’t [Marvel’s] policy” and he “can’t think of any case” where any compensation was “dependent on the success of the sales of the comic book”).

**RESPONSE:** Counterclaimant admits that Marvel did not pay royalties or profit participation to Ditko, but disputes that Marvel did not owe Ditko payment for reprints or use of his creations in other media, which is part of the reason Ditko refused to sell any further work to Marvel at the end of the Period. *See* Toberoff Decl. Ex. 3 at 44:22-46:12 (Romita testifying that Ditko quit *Spider-Man* because he had personal and professional conflicts with Lee); Ex. 20 at 57:13-59:3 (Evanier testifying that Ditko told him he had been promised by Marvel management additional compensation if his characters were used in other media); Ex. 24 at 124:5-24 (Levitz testifying that Ditko and Lee stopped speaking in the last year of Ditko’s time with Marvel because Ditko was not getting proper credit for his contributions).

52. **Marvel’s Statement:** If a comic book did not sell well or lost money, Marvel (*i.e.*, Goodman) would ultimately bear the loss, not Ditko or other freelancers. Lens Decl., Ex. 2 140:21-141:3 (Thomas confirming that he was paid his same “per page” rate “whether the comic was a hit or a flop” and that “if a comic that [he] worked on lost money from Marvel, Marvel didn’t take that out of [his] paychecks”); Lens Decl., Ex. 57 at 4 (Ditko acknowledging that “[p]ublishing comic book titles is a risky, competitive business and with monthly titles and with no guarantees”); Lens Decl., Ex. 13 43:3-44:2 (Lee explaining publisher Martin Goodman’s perspective that he had “no guarantee” that Marvel’s comic books would sell, faced months-long stretches in which he was “losing money where the books don’t sell” but would not “cut [artists’] rate,” and was the one “taking all the risk”); *see also* Lens Decl., Ex. 54 at 3; Lens Decl., Ex. 13 58:13-21; Lens Decl., Ex. 6 33:16-34:1; Lens Decl., Ex. 7 178:15-23, 224:24-225:15; Lens Decl., Ex. 4 129:24-130:4; Lens Decl., Ex. 3 155:12-23, 226:12-15; Lens Decl., Ex. 79 at 4.

**RESPONSE:** Counterclaimant disputes that if a book did not sell well, Ditko would not bear any loss, because, if a book were discontinued by Marvel, it would not purchase

**any more stories from Ditko for such discontinued book, and therefore, Ditko too bore the risk that a book might not sell well. Counterclaimant further disputes the relevance of this statement to the legal issues in this case as any publisher bears the risk that the works it published might not sell well.** *See* Counterclaimant’s Response to Marvel’s Statement 50, *supra*, incorporated herein by reference. *See also* Toberoff Decl. Ex. 20 at 73:14-74:24 (Evanier testifying that Marvel had asked Evanier to submit some work in the 1970s prior to 1978, for a new magazine, but that after he did the work, Marvel declined to buy it or pay for it since it decided not to publish the magazine after all).

53. **Marvel’s Statement:** Ditko, like other freelancers, confirmed his understanding that he worked for Marvel on a work-made-for-hire basis. Lens Decl., Ex. 23A at 2 (agreement between Marvel and Ditko whereby Ditko “acknowledges, agrees and confirms that any and all work, writing, art work material or services (the ‘Work’) which have been or are in the future created, prepared or performed by [him] for the Marvel Comics Group have been and will be specially ordered or commissioned for use as a contribution to a collective work and that as such Work was and is expressly agreed to be considered a work made for hire.”); Lens Decl., Ex. 64 at 9 (Defendant acknowledging the above agreement); Lens Decl., Ex. 2 40:24-41:8 (Thomas testifying that “I understood when I came into the company that Marvel . . . would own the characters, the stories, the writing, whatever I was doing, and that was also made clear by the statement on the back of the check from the earliest days”); Lens Decl., Ex. 2 48:11-49:4 (Thomas testifying that he “didn’t like creating many characters for Marvel, because [he] knew [he] wouldn’t own them”); Lens Decl., Ex. 2 60:19-61:6 (Thomas agreeing that, “for the entire tenure that [he] worked with Marvel,” he understood “that Marvel would have all of the rights, including copyrights and anything that [he] worked on at Marvel”); Lens Decl., Ex. 13 at 26:22-

28:6 (Lee testifying that “it was typical in the industry for comic book publishers to own the rights to the materials that were created for them for publication” during the Time Period); Lens Decl., Ex. 13 at 100:25-101:17 (Lee testifying that he “always felt the company” owned the characters he created or co-created); Lens Decl., Ex. 20 at 2 (Marvel artist Gene Colan writing that “[p]ages were stamped on the back ‘work for hire’ . . . In the narrow field of comic art, one either worked ‘for hire’ or didn’t work!”); Lens Decl., Ex. 19 at 2 (agreement between Marvel and Colan that his contributions to Marvel’s comic books “were created as works made for hire”); Lens Decl., Ex. 23A-E (documentation reflecting hundreds of freelancers’ “express[] agree[ment]” that their work would “be considered a work made for hire.”); Lens Decl., Ex. 7 355:18-23 (Thomas testifying that the popularization of “the term ‘work-for-hire’” in the mid-1970s only formalized “the same general situation that had already existed”).

**RESPONSE: Counterclaimant disputes that Ditko “confirmed his understanding that he worked for Marvel on a work-made-for-hire basis,” as Marvel required him to sign a self-serving retroactive work-for-hire release, e.g., identical to the one signed by Randy Schueller, who created a black costumed Spider-Man completely “on spec.” This retroactive “work for hire” whitewash was a common practice at Marvel in the years after the 1976 Copyright Act took effect and only serves to underscore its pervasive insecurity as to this issue and revisionist practices since that time. Such Marvel incantations have been specifically held to be unenforceable by the Second Circuit, particularly in the copyright termination context. *See Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 292 (2d Cir. 2002) (“[W]e hold that an agreement made subsequent to a work's creation which retroactively deems it a ‘work for hire’ constitutes an [unenforceable] ‘agreement to the contrary’ under § 304(c)(5) of the 1976 Act. ”). Much of Marvel’s cited “evidence” also**

concerns “ownership,” not authorship and is therefore consistent with ownership via the purchase and assignment of freelance material (Magazine Management’s simple business practice in the Period) and not “work for hire.” See Toberoff Decl. Ex. 1 at 17 (Evanier Rep. describing Marvel’s practice of running competitions to discover new, aspiring artist and writers); Ex. 34 at 1 (Randy Schueller (“Schueller”) interview explaining that Marvel ran a competition for aspiring writers and artists in the early 1980s); Ex. 1 at 17 (Evanier Rep. describing Schueller’s unique Spider-Man submission and his amateur status); Ex. 31 at 2 (Walter Durajlija (“Durajlija”) writing that young fan Schueller won an ideas contest Marvel was having in 1982 with his idea for a black Spider-Man costume); *id.* at 2 (Durajlija writing that Marvel editor Shooter liked the costume idea and bought it from Schueller for \$220); Ex. 34 at 2 (Schueller interview explaining that he came up with, and submitted to Marvel, a story featuring a black-costume Spider-Man); *id.* at 2 (Schueller interview explaining that, a few months after he submitted his black-costume *Spider-Man* story, Shooter wrote to him offering to buy it for \$220); Ex. 17 at 59:2-10 (Thomas testifying that Jim Shooter was editor-in-chief at Marvel in the 1980s); Ex. 32 (Shooter letter dated August 3, 1982 offering to buy Schueller’s black-costume *Spider-Man* story submission for \$220 and telling Schueller to sign the attached “Work-made-for-hire Agreement”); Ex. 37 at 2021MARVEL-0054634-005636 (sample 1979-1980 artwork releases retroactively claiming the returned artwork was done by Marv Wolfman as an “employee-for-hire”); Ex. 38 (retroactive work-for-hire agreement signed by Schueller dated August 9, 1982); Ex. 1 at 17 (Evanier Rep. identifying Schueller’s August 9, 1982 contract as being the same as those Marvel forced freelancers to sign in the late 1970s); Ex. 39 (retroactive work-for-hire contract dated January 26, 1979 allegedly signed by Ditko); Ex. 48 at (Certificate of Registration of a Claim for Copyright dated August 31, 1964 for *Amazing Spider-Man Annual*

Vol. 1, No. 1 filed by Magazine Management and identifying Lee as the “Author” and Non-Pareil as the “Copyright Claimant.” Compared to the Certificate of Renewal Registration for *Amazing Spider-Man Annual* Vol. 1, No. 1 filed by Cadence’s purported successor, Marvel Entertainment Group, dated December 15, 1992 and now claiming Lee as an “Employee for Hire of Non-Pareil”).

54. **Marvel’s Statement:** Ditko acknowledged that he did not own legal rights to characters he worked on for Marvel. Lens Decl., Ex. 57 at 3 (letter from Ditko stating that he “never claimed creating Spider-Man” and that Marvel “own[s] the art pages, the published material”); Lens Decl., Ex. 52 at 3 (Ditko voicing dismay with the movie depiction of Doctor Strange but agreeing that “whoever has the rights can add and subtract from the original any way he chooses”); Lens Decl., Ex. 59 at 3 (Ditko critiquing Marvel’s editorial choices, but acknowledging that, even if certain “ideas” were his, he “had no real right to them when published”); *see also* Lens Decl., Ex. 50 at 3.

**RESPONSE:** Counterclaimant admits that it was understood that Marvel *owned* all rights to the Ditko works that Magazine Management decided to purchase and pay for, but disputes that Ditko and/or Magazine Management in the Period viewed or intended Ditko’s creations as “work made for hire” owned by Magazine Management (or Goodman’s shell companies) at the moment of creation as the “author” of such works. *See* Toberoff Decl. Ex. 8 ¶¶ 14-15 (Sinnott attesting that in the 1950s and 1960s, he did not consider his freelance work submitted to Marvel to be done as “work made for hire”); Ex. 9 ¶ 8 (Steranko attesting that no one at Marvel ever informed him that his work was being created as “work made for hire” from 1966 to 1973); Ex. 10 ¶ 13 (Ayers attesting that he thought Marvel owned his work because it bought the material he submitted, but that he never heard the term “work for hire” and did not

think his work was created as “work made for hire”); Ex. 11 ¶ 12 (Colan attesting that he believed Marvel owned the work it purchased from him, but that he never heard the term “work for hire”); Ex. 13 ¶¶ 12-13 (Adams attesting that he did not consider the work he submitted to Marvel to be done as “work made for hire”); Ex. 21 at 97:3-23 (Steranko testifying that he believed that when he walked into Marvel to deliver his freelance material, he still owned the work and that his work belonged to him until he cashed the check Marvel wrote to him); Ex. 22 at 266:13-267:2 (Lieber testifying that he believed he owned his freelance material until Marvel bought it from him); Ex. 54 at 2021MARVEL-0070259 (Marvel President James Galton (“Galton”) correspondence to Thomas dated February 24, 1978 stating “it was our intent that all copyrights be assigned to Marvel, I assume this is acceptable to you ... I would appreciate your signing ... to confirm that all right to claim renewal and extension of copyrights are assigned to Marvel”); Ex. 64 at 245 n.80 (Nimmer explaining *in 1963* “that 17 U.S.C. Sec. 26 expressly renders an employer for hire an ‘author’ but makes no comparable provision with respect to commissioned works”); Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 17 at 295:8-296:8, 297:1-20 (Thomas testifying that Marvel could accept or reject submitted material in its sole discretion); Ex. 22 at 303:15-19 (Lieber testifying he thought the name on the checks was Marvel or Magazine Management); Ex. 45 at 4142-4154, 4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”); Ex. 1 at 16 (Evanier Rep. describing the



comic book industry and Marvel’s custom and practice of stamping legends on the backs of checks to freelancers in the Period, thereby forcing freelancers to sign the legend to cash the check); Ex. 8 ¶ 13 (Sinnott attesting that Marvel paid him with checks that had an assignment legend on the back); Ex. 21 at 63:10-64:17, 91:11-93:19 (Steranko testifying that he would cross out the legend on the backs of the Marvel checks because he thought it was bad business to add an after-the-fact condition to payment on work that had been submitted a week or two prior); Ex. 45 at 4142-4154, 4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975, with assignment legends stamped on the backs of the checks); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”); Ex. 9 ¶ 13 (Steranko attesting that legends on the backs of Marvel’s checks to him used assignment, not work-for-hire, language); Ex. 10 ¶ 14 (Ayers attesting that Marvel’s check legends used assignment language); Ex. 11 ¶ 12 (Colan attesting that the legends on the backs of Marvel’s checks used assignment, not work-for-hire, language); Ex. 13 ¶ 14 (Adams attesting that Marvel’s check legends used assignment language only); Ex. 21 at 61:23-62:3, 91:11-93:19 (Steranko testifying that in the 1960s, Marvel’s check legends did not say “work for hire,” but indicated that Steranko “gave them the rights to the work, sold them the rights to the work”).

55. **Marvel’s Statement:** Ditko acknowledged that he did not own copyrights in his work for Marvel, in contrast to his work with Wally Wood’s “witzend” magazine. *Compare* Lens Decl., Ex. 56 at 2 (Ditko writing that “Wally Wood’s Witzend [] gave writers, artists the opportunity to copyright their original ideas, created material when published”), Lens Decl., Ex. 61 at 3 (Ditko describing Wally Wood as “a stand-out in many ways” including that “[h]e

published witzend—where one could copyright his own ideas, creations—I took advantage of it, my Mr. A, etc.”), *and* Lens Decl., Ex. 61 at 2 (Ditko writing that “Mr. A is my copyrighted PROPERTY” and that “NO ONE, but me, has any right” to it), *with* Lens Decl., Ex. 44 at 4 (Ditko acknowledging that “Spider-Man & Doctor Strange are copyrighted by the Magazine Management company”); *see also* Lens Decl., Ex. 49 at 2 (Ditko writing that the “[m]ost important” thing about “Witzend” “was that one could copyright, own one’s creative ideas, work”); Lens Decl., Ex. 60 at 3 (Ditko writing that “Wally Wood did an astounding thing for writers and artists, an opportunity to create and copyright what one creates, protecting and able to cash in on it at any future time”); Lens Decl., Ex. 51 at 3 (Ditko writing that “Wally Wood who created WITZEND wanted a publication for creators to copyright their ideas, creations”).

**RESPONSE: Counterclaimant admits that it was understood that Marvel *owned* all rights to the Ditko works that Magazine Management decided to purchase and pay for, but disputes that Ditko and/or Magazine Management in the Period viewed or intended Ditko’s creations as “work made for hire” owned by Magazine Management (or Goodman’s shell companies) at the moment of creation as the “author” of such works.** *See* Toberoff Decl. Ex. 8 ¶¶ 14-15 (Sinnott attesting that in the 1950s and 1960s, he did not consider his freelance work submitted to Marvel to be done as “work made for hire”); Ex. 9 ¶ 8 (Steranko attesting that no one at Marvel ever informed him that his work was being created as “work made for hire” from 1966 to 1973); Ex. 10 ¶ 13 (Ayers attesting that he thought Marvel owned his work because it bought the material he submitted, but that he never heard the term “work for hire” and did not think his work was created as “work made for hire”); Ex. 11 ¶ 12 (Colan attesting that he believed Marvel owned the work it purchased from him, but that he never heard the term “work for hire”); Ex. 13 ¶¶ 12-13 (Adams attesting that he did not consider the work he submitted to

Marvel to be done as “work made for hire”); Ex. 21 at 97:3-23 (Steranko testifying that he believed that when he walked into Marvel to deliver his freelance material, he still owned the work and that his work belonged to him until he cashed the check Marvel wrote to him); Ex. 22 at 266:13-267:2 (Lieber testifying that he believed he owned his freelance material until Marvel bought it from him); Ex. 54 at 2021MARVEL-0070259 (Marvel President James Galton (“Galton”) correspondence to Thomas dated February 24, 1978 stating “it was our intent that all copyrights be assigned to Marvel, I assume this is acceptable to you ... I would appreciate your signing ... to confirm that all right to claim renewal and extension of copyrights are assigned to Marvel”); Ex. 64 at 245 n.80 (Nimmer explaining *in 1963* “that 17 U.S.C. Sec. 26 expressly renders an employer for hire an ‘author’ but makes no comparable provision with respect to commissioned works”); Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 17 at 295:8-296:8, 297:1-20 (Thomas testifying that Marvel could accept or reject submitted material in its sole discretion); Ex. 22 at 303:15-19 (Lieber testifying he thought the name on the checks was Marvel or Magazine Management); Ex. 45 at 4142-4154, 4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”); Ex. 1 at 16 (Evanier Rep. describing the comic book industry and Marvel’s custom and practice of stamping legends on the backs of checks to freelancers in the Period, thereby forcing freelancers to sign the legend to cash the check); Ex. 8 ¶ 13 (Sinnott attesting that Marvel paid him with checks that had an assignment

legend on the back); Ex. 21 at 63:10-64:17, 91:11-93:19 (Steranko testifying that he would cross out the legend on the backs of the Marvel checks because he thought it was bad business to add an after-the-fact condition to payment on work that had been submitted a week or two prior); Ex. 45 at 4142-4154, 4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975, with assignment legends stamped on the backs of the checks); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber's "assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright"); Ex. 9 ¶ 13 (Steranko attesting that legends on the backs of Marvel's checks to him used assignment, not work-for-hire, language); Ex. 10 ¶ 14 (Ayers attesting that Marvel's check legends used assignment language); Ex. 11 ¶ 12 (Colan attesting that the legends on the backs of Marvel's checks used assignment, not work-for-hire, language); Ex. 13 ¶ 14 (Adams attesting that Marvel's check legends used assignment language only); Ex. 21 at 61:23-62:3, 91:11-93:19 (Steranko testifying that in the 1960s, Marvel's check legends did not say "work for hire," but indicated that Steranko "gave them the rights to the work, sold them the rights to the work").

56. **Marvel's Statement:** Defendant seeks to terminate purported grants and/or transfers of copyright allegedly stamped on the back of checks between Marvel, on the one hand, and Ditko, on the other. *See, e.g.,* Lens Decl., Ex. 63 at 4-5, 8-9, 15, 19-20.

**RESPONSE:** Counterclaimant admits that it seeks to terminate grants of copyright from Ditko to Magazine Management in the Period, whether those grants took place via an implied assignment at the point of sale of Ditko's pages to Magazine Management, or via the explicit "assignment[s]" of "copyright" including "the renewal copyright" memorialized in the endorsement legends Magazine Management placed on the back of its

**checks to freelancers for the purchase of their material.** *See* Toberoff Decl. Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 17 at 295:8-296:8, 297:1-20 (Thomas testifying that Marvel could accept or reject submitted material in its sole discretion); Ex. 22 at 303:15-19 (Lieber testifying he thought the name on the checks was Marvel or Magazine Management); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright” and no mention of “work made for hire” whatsoever); Ex. 45 at 4142-4154, 4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975 containing explicit “assignment” of “copyright” language and no mention of “work for hire” whatsoever); Ex. 1 at 16 (Evanier Rep. describing the comic book industry and Marvel’s custom and practice of stamping such legends on the backs of checks to freelancers in the Period, thereby forcing freelancers to sign the legend to cash the check); Ex. 8 ¶ 13 (Sinnott attesting that Marvel paid him with checks that had an explicit assignment legend on the back); Ex. 21 at 63:10-64:17, 91:11-93:19 (Steranko testifying that he would cross out the legend on the backs of the Marvel checks because he thought it was bad business to add an after-the-fact condition to payment on work that had been submitted a week or two prior); Ex. 9 ¶ 13 (Steranko attesting that legends on the backs of Marvel’s checks to him used assignment, not work-for-hire, language); Ex. 10 ¶ 14 (Ayers attesting that Marvel’s check legends used assignment language); Ex. 11 ¶ 12 (Colan attesting that the legends on the backs of Marvel’s checks used assignment, not work-for-hire, language); Ex. 13 ¶ 14 (Adams attesting that Marvel’s check legends used assignment language

only); Ex. 21 at 61:23-62:3, 91:11-93:19 (Steranko testifying that in the 1960s, Marvel's check legends did not say "work for hire," but indicated that Steranko "gave them the rights to the work, sold them the rights to the work"). *See also* Lens Decl., Ex. 63 (Counterclaimant's Notices of Termination each stating at 3 n.3: "This Notice of Termination also applies to each and every grant or alleged grant by Stephen J. Ditko of rights under copyright in and to the Work that falls within the applicable termination time window (defined by 17 U.S.C. § 304(c) and the effective date of this Notice of Termination"); Ex. 64 at 10 (Counterclaimant referring, alternatively, to Ditko's "implied assignment ... due to Steve Diko's acceptance of payment from Marvel for his material and Marvel's subsequent known exploitation of his material.").

57. **Marvel's Statement:** Defendant does not have any checks from Marvel to Ditko during the Time Period and cannot attest to the language on the backs of the checks. Lens Decl., Ex. 1 28:12-23 (Defendant conceding that he had not "seen any checks from Marvel to Steve Ditko from the 1960s" or "seen the backs of any checks from Marvel to Steve Ditko from the 1960s"); Lens Decl., Ex. 64 at 9 (Defendant identifying the purported grants as check legends "contain[ing] express purchase and assignment language," but failing to identify any specific language).

**RESPONSE:** Counterclaimant admits that it does not possess checks from Magazine Management to Ditko in the Period because Ditko naturally deposited the checks he received from Magazine Management, but Counterclaimant notes that the record consists of numerous checks to other freelancers, all of which have explicit "assignment" of "copyright" language and no mention of "work for hire" in the legends Magazine Management put on the backs of its checks to such freelancers. Additionally, there is significant sworn testimony from freelancers from the Period concerning the explicit

**“assignment” of copyright language in the endorsement legends on the back of Magazine Management’s checks.** *See* Lens Decl., Ex. 63 (Counterclaimant’s Notices of Termination each stating at 3 n.3: “This Notice of Termination also applies to each and every grant or alleged grant by Stephen J. Ditko of rights under copyright in and to the Work that falls within the applicable termination time window (defined by 17 U.S.C. § 304(c) and the effective date of this Notice of Termination”); Ex. 64 at 10 (Counterclaimant referring, alternatively, to Ditko’s “implied assignment ... due to Steve Diko’s acceptance of payment from Marvel for his material and Marvel’s subsequent known exploitation of his material.”). *See also* Toberoff Decl. Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 45 at KIRBY-4142-4154, KIRBY-4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”); Ex. 1 at 16 (Evanier Rep. describing the comic book industry and Marvel’s custom and practice of stamping legends on the backs of checks to freelancers in the Period, thereby forcing freelancers to sign the legend to cash the check); Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 8 ¶ 13 (Sinnott attesting that Marvel paid him with checks that had an assignment legend on the back); Ex. 21 at 63:10-64:17, 91:11-93:19 (Steranko testifying that he would cross out the legend on the backs of the Marvel checks because he thought it was bad business to add an after-the-fact condition to payment on work that had been submitted a week or two prior); Ex. 9 ¶ 13 (Steranko

attesting that legends on the backs of Marvel's checks to him used assignment, not work-for-hire, language); Ex. 10 ¶ 14 (Ayers attesting that Marvel's check legends used assignment language); Ex. 11 ¶ 12 (Colan attesting that the legends on the backs of Marvel's checks used assignment, not work-for-hire, language); Ex. 13 ¶ 14 (Adams attesting that Marvel's check legends used assignment language only); Ex. 21 at 61:23-62:3, 91:11-93:19 (Steranko testifying that in the 1960s, Marvel's check legends did not say "work for hire," but indicated that Steranko "gave them the rights to the work, sold them the rights to the work"); Ex. 22 at 269:24-271:20 (Lieber testifying that the check legends used assignment, not work-for-hire language).

58. **Marvel's Statement:** Marvel does not have checks from Marvel to Ditko during the Time Period and cannot attest to what they said. Bard Decl. ¶ 3; Lens Decl., Ex. 65 at 4; Lens Decl., Ex. 2 139:3-23; Lens Decl., Ex. 12 71:25-72:19; Lens Decl., Ex. 3 153:2-154:21, 296:3-6, 297:7-13; Lens Decl., Ex. 9 31:17-32:5, 32:17-33:5.

**RESPONSE:** Admitted only that Marvel alleges that it does not have in its possession, custody or control checks from Magazine Management (or any other alleged "Marvel" entity) to Ditko during the relevant Period, or to any other freelancers during the Period however, reasonable inferences can be drawn from the Magazine Management checks to freelancers from the early to mid-1970's that Magazine Management's checks to Ditko in the Period for the purchase of his material bore the same assignment of copyright endorsement legends on the back. Additionally, there is significant sworn testimony from freelancers from the Period concerning the explicit "assignment" of copyright language in the endorsement legends on the back of Magazine Management's checks. See Toberoff Decl. Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 5 at 371:3-25 (Lee



testifying that Marvel “would only buy what [it] needed”); Ex. 45 at 4142-4154, 4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”); Ex. 1 at 16 (Evanier Rep. describing the comic book industry and Marvel’s custom and practice of stamping legends on the backs of checks to freelancers in the Period, thereby forcing freelancers to sign the legend to cash the check); Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 8 ¶ 13 (Sinnott attesting that Marvel paid him with checks that had an assignment legend on the back); Ex. 21 at 63:10-64:17, 91:11-93:19 (Steranko testifying that he would cross out the legend on the backs of the Marvel checks because he thought it was bad business to add an after-the-fact condition to payment on work that had been submitted a week or two prior); Ex. 9 ¶ 13 (Steranko attesting that legends on the backs of Marvel’s checks to him used assignment, not work-for-hire, language); Ex. 10 ¶ 14 (Ayers attesting that Marvel’s check legends used assignment language); Ex. 11 ¶ 12 (Colan attesting that the legends on the backs of Marvel’s checks used assignment, not work-for-hire, language); Ex. 13 ¶ 14 (Adams attesting that Marvel’s check legends used assignment language only); Ex. 21 at 61:23-62:3, 91:11-93:19 (Steranko testifying that in the 1960s, Marvel’s check legends did not say “work for hire,” but indicated that Steranko “gave them the rights to the work, sold them the rights to the work”); Ex. 22 at 269:24-271:20 (Lieber testifying that the check legends used assignment, not work-for-hire language).

**COUNTERCLAIMANT’S ADDITIONAL MATERIAL FACTS**

1. **Except perhaps to a devotion to Westerns, Goodman had no particular interest in what he published, so long as it sold.** *See* Toberoff Decl. Ex. 85 at 21 (“While Martin Goodman loved Westerns, he seemed to have no feel at all for action heroes.... Martin Goodman was adept at putting out comic books but he lacked imagination when it came to what made those comics interesting to readers. Famously, he also resisted the idea of publishing Spider-Man when Stan Lee presented it to him.”); *id.* at 26 (“For [Goodman], success meant jumping and pumping—jumping on a successful trend and pumping multiple similar titles (with the least possible investment) through the pipeline as fast as possible in order to rake in as much profit as possible.”).

2. **From the 1930s to 1960s, Goodman threw innumerable pulps, magazines, digests, comic books, and paperbacks at the wall to see what would sell. Whatever other publishers were selling at any particular time (men’s magazines, sado-masochism, science fiction, sex advice, superhero comics, pulp fiction), he sourced and copied that content in multiple iterations and imitations.** *See* Toberoff Decl. Ex. 85 at 26 (“Within this nexus of cheap periodicals, multiple publishing fronts, and whirlwind title changes, the trends that defined Goodman’s business principles began to emerge. The *modus operandi* that Goodman adopted to satisfy his thirst for a quick profit at any cost (except, of course, for the cost of investing in quality original material) got him censured by the federal government on at least four occasions.”); *id.* at 26 (“For [Goodman], success meant jumping and pumping—jumping on a successful trend and pumping multiple similar titles (with the least possible investment) through the pipeline as fast as possible in order to rake in as much profit as possible.”); *id.* at 45 (“Rather than try to innovate, [Goodman’s] strategy was to imitate. Let someone else risk their money

experimenting with different types and genres of magazines, trying to discover the next popular trend. Once a winner emerged, Goodman would jump in with a knockoff. Or two. Or twelve, if he could get away with it.”); *id.* at 53 (“The most dubious trend that Goodman chased was that of the ‘shudder pulp’ genre ... [which] served up savage sadomasochist tales of satanic rituals with copious amounts of brutal rape and other violence towards women.”).

3. **Goodman had little respect for intellectual property, and merely imitated and published works he had no rights to.** *See* Toberoff Decl. Ex. 85 at 26 (“Within this nexus of cheap periodicals, multiple publishing fronts, and whirlwind title changes, the trends that defined Goodman’s business principles began to emerge. The *modus operandi* that Goodman adopted to satisfy his thirst for a quick profit at any cost (except, of course, for the cost of investing in quality original material) got him censured by the federal government on at least four occasions.”); *id.* at 29 (“[I]n 1947, the FTC issued a “cease and desist” order, having found that Goodman’s line of pulps and crime digest paperbacks, published between 1942 and 1945, “falsely represented that their books and other publications contained original, complete and unabridged novels, stories or articles” and that “changing the title of novels, stories and articles without properly disclosing that such changes have been made was another practice found to be deceptive”); Ex. 84 at 2 (On August 16, 1947 the Federal Trade Commission issued a cease-and-desist order to Martin and Jean Goodman regarding repeated misrepresentations in the sale of publications, including without limitation (i) falsely representing that their publications contained original, complete and unabridged novels, stories or articles when actually the publications contained condensed, abridged or altered. versions of previously published material; and (ii) deceptively changing the title of novels, stories and articles without properly disclosing this. An order to cease and desist was issued, with the concurrence of all the Commissioners,

after the Goodmans filed an answer admitting all the material allegations of fact in the complaint and waived all intervening procedure and further hearing.); Ex. 85 at 21 (“When Goodman decided to enter the comic book arena, which demanded action heroes, he decided to revive The Masked Rider ... By that time, though, ownership of the Masked Rider had changed hands and it was being published by someone else ... No problem. *Marvel Comics* #1 debuted with ... The Masked Raider) (emphasis original); *id.* at 28 (“It took two years, but on January 5, 1942, the FTC slammed ... Goodman ... for deceptively reprinting stories as new fiction, substituting new titles for the original titles ... [and] for stripping the original copyrights and claiming the work as their own.”); *id.* at 36 (“Thus began Goodman’s ... creation of an intricate web of shell publishers for [his] magazines (in Goodman’s case, sometimes approaching 50 at one time). The purpose was to shield Goodman ... from legal liability—an ever-present threat due in large part to some questionable business practices.”).

4. **From its beginnings in the Great Depression to the 1960s, the comic book business was a “fly-by-night” operation where publishers quickly came and went.** *See* Toberoff Decl. Ex. 1 at 7 (Evanier Rep. providing historical background and explaining volatile historical context of comic book business from the 1930s to the 1960s); Ex 3 at 204:6-23, 242:16-243:8 (Romita testifying that Goodman would open and close his comic book business at the drop of a hat and that Romita had no employment security); Ex. 13 ¶ 13 (Adams attesting that the comic book business was hand-to-mouth and the early years were a confusing time when one was not sure whether any particular comic book would still be around in a year).

5. **Comic book publishers saw little value in their disposable product beyond monthly sales figures.** *See* Toberoff Decl. Ex. 1 at 7 (Evanier Rep. describing the custom and practice of comic book publishers attributing little value to comic books in the industry’s early

years); Ex 3 at 78:21-79:21, 254:2-25 (Romita testifying that no one at Marvel cared about the comic book characters until the 1950s and he never thought the art would be worth anything or that the comic book industry would last); Ex. 20 at 50:21-53:25, 154:13-155:14, 156:11-17 (Evanier testifying that Goodman saw little value in the work being done in the 1960s and was just following trends, that Lee told Evanier that comics would crumble and nothing would be remembered, and that Brodsky told Evanier that, in the 1960s, no one expected the comics books to ever be reprinted).

6. **Little to no attention was paid to copyright issues by the publishers or artists.** *See* Toberoff Decl., Ex. 1 at 7 (Evanier Rep. describing the custom and practice of comic book publishers attributing little value to comic books in the industry’s early years and the lack of attention paid to copyrights of the material); Ex 3 at 78:21-79:21, 254:2-25 (Romita testifying that no one at Marvel cared about the characters until the 1950s and he never thought the art would be worth anything or that the comic book industry would last).

7. **In addition, from the 1940s until June 1968, Goodman also operated his comic book business through dozens of unrelated shell companies.** *See* Toberoff Decl., Ex. 14 at 4 (Rebuttal Expert Report of Mark Evanier (“Evanier Rebuttal Rep.”) providing historical context and explaining that Goodman registered the copyright to comic books under the names of various shell corporations that were unrelated to each other); Ex. 17 at 317:18-318:18 (Thomas testifying that Goodman ran “Marvel” as a bunch of small companies rather than just as a unified Magazine Management for some unknown business or legal reasons); Ex. 20 at 196:1-12 (Evanier testifying that Brodsky described Goodman’s shell companies as “shell companies”); Ex. 24 at 49:21-50:22 (Paul Levitz (“Levitz”) testifying that Vista Publications, Inc. (“Vista”) was one of Goodman’s shell companies); Ex. 46 at 1-3 (list of Goodman’s shell companies dated

October 4, 1967 showing no legal or corporate relationship to one another or Magazine Management).

8. **These shell companies had no employees, no actual offices or business activities, and, aside from being the name listed on the comic book cover copyright indicia, had no connection whatsoever to the works they purportedly copyrighted and published.**

*See* Toberoff Decl. Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that the shell companies had no employees, offices, or business activities, and had no contact with any freelancer); Ex. 17 at 244:15-23, 278:20-279:20 (Thomas testifying that the door to “Marvel’s” office in 1965 only said “Magazine Management” and “Marvel’s” employees worked in Magazine Management’s offices); *id.* at 318:4-322:14 (Thomas testifying that Vista, Atlas Magazines, Inc. (“Atlas”), Non-Pareil Publishing Corp. (“Non-Pareil”), and others were just used as names on the comic book cover copyright indicia, but other than the indicia, no one knew what those entities did); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 24 at 51:19-52:2 (Levitz testifying that Goodman’s shell companies had no actual offices and that only Magazine Management had offices); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material from 1962 to 1966 (the “Period”)).

9. **“Marvel” from its inception through the 1960s, was unique in its informality**

**and disorganization.** *See* Toberoff Decl. Ex. 24 at 112:20-113:4 (Levitz testifying that Marvel was disorganized and did not have document retention policies and could not even keep track of its published comic books, which was very different than the more-organized DC Comics); Ex. 8 ¶ 10 (Joe Sinnott (“Sinnott”) attesting that Marvel was very small and disorganized in the 1950s and 1960s); Ex. 102 at 8-9 (Flo Steinberg (“Steinberg”) explaining that, when she was hired at Marvel in March 1963, she and Lee were the only employees and noting that Marvel had the “teeniest little office” and that there “was just a small amount of comics to get out”).

10. **Lee started at Timely as an office boy.** *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. describing Lee’s role as an office boy at Timely); Ex. 4 at 10:23-11:17 (Lee testifying that he got hired at Timely in 1939 or 1940); Ex. 56 at 82:13-22 (Lee testifying he started at Timely around 1940 when he was 17 years old).

11. **Lee was the nephew of Goodman’s business manager who married into the Goodman family, making Lee, Goodman’s relative.** *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. describing Lee’s familial connection to Goodman); Ex. 5 at 296:10-14 (Lee testifying he was Goodman’s wife’s cousin).

12. **In 1941, Goodman promoted Lee, then 18, to the role of editor of his fledgling comic book business.** *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. describing Lee’s promotion from office boy and apprentice writer to editor); Ex. 4 at 14:2-17 (Lee testifying that he got promoted to editor).

13. **By the mid-1940s, Timely had staff artists on salary, but in 1949, Goodman discovered surplus artwork, and fired his entire staff.** *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. providing historical context giving rise to Marvel’s purchase of material from freelance creators and explaining that Goodman’s discovery of surplus, unpublished artwork in 1949

caused him to fire his staff artists); Ex. 5 at 368:11-369:14, 371:3-25 (Lee testifying that Goodman discovered excess artwork and had Lee fire almost everyone and that artists went from having guarantees from Goodman for a certain amount of work, to working freelance where Marvel “would only buy what [it] needed”); Ex. 11 ¶ 4 (Colan attesting that he was originally hired in 1946 as a staff artist for Timely, but was let go in the late 1940s, at which point he “sold artwork on a freelance basis to Timely”).

14. **In 1954-57, Senate hearings on the corrupting influence of comics nearly bankrupted Timely, now Magazine Management.** *See* Toberoff Decl. Ex 3 at 200:4-202:4 (Romita testifying that, around 1957, Timely/Atlas was having financial troubles because of Congressional hearings so the company cut artists and cut the number of comic book issues it was publishing); Ex. 24 at 138:16-140:7 (Levitz testifying that the comic book industry underwent great unrest in the 1950s).

15. **In 1957, Magazine Management again fired essentially all its employees except Lee.** *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. providing historical context giving rise to Marvel’s relationship with freelancers and describing Goodman’s decision to fire all writers and artists except Lee); Ex 3 at 123:18-125:12 (Romita testifying that he was fired around 1957 and was not paid for the work he was in the middle of completing); Ex. 5 at 372:19-373:13 (Lee testifying that Goodman had Lee fire everyone a second time in response to the Senate comic book controversy); Ex. 8 ¶ 10 (Sinnott attesting that Marvel fired its staff in 1957).

16. **Magazine Management went from publishing 45 comics per month to 8.** *See* Toberoff Decl. Ex. 1 at 9 (Evanier Rep. providing historical context and describing Magazine Management’s severe reduction in the number of books it published during the 1950s); Ex 3 at 123:18-125:12, 200:4-202:4 (Romita testifying that, around 1957, Timely/Atlas was having



financial troubles so the company cut artists and cut the number of titles it published); Ex. 17 at 110:11-23 (Thomas testifying that Marvel was publishing only 8 comics per month in the 1960s); Ex. 102 at 8-9 (Flo Steinberg explaining that, when she was hired at Marvel in March 1963, she and Lee were the only employees and noting that Marvel had the “teeniest little office” and that there “was just a small amount of comics to get out”).

17. **In 1958, to keep its operations afloat, Magazine Management resumed buying freelance material at a per-page rate, but purposefully had no written contracts with freelancers, including Steve Ditko (“Ditko”).** *See* Toberoff Decl. Ex. 1 at 10, 13 (Evanier Rep. providing historical context giving rise to Marvel’s use of freelance creators and explaining that, when Magazine Management ran out of surplus artwork to publish, it began to purchase artwork and scripts from freelancers at a low page rate and that freelancers did not have written contracts with Magazine Management during the 1950s or 1960s); Ex. 14 at 10-11 (Evanier Rebuttal Rep. explaining that it was not the custom and practice of Marvel or other publishers in the comic book industry to have written contracts with freelance creators during the Period); Ex. 2 at 71:17-74:5 (Lieber testifying that he sold freelance work to Marvel in the 1950s and 1960s, had no contract with Marvel, and that Marvel was not obligated to buy his submitted freelance material); Ex. 3 at 159:24-160:4, 194:11-195:3, 211:7-212:3 (Romita testifying that he did not have a contract with Marvel as a freelancer); Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 6 at 36:17-21, 202:2-20 (Thomas testifying that he had no contract with Marvel until 1974); Ex. 8 ¶ 10 (Sinnott attesting that he had no contract with Marvel and Marvel was very small and disorganized in the 1950s and 1960s); Ex. 8 ¶ 11 (Sinnott attesting that Marvel had no obligation to buy pages of his work and that Marvel paid only for the pages it wanted); Ex. 9 ¶ 8 (James Steranko (“Steranko”) attesting that he did not have a contract with

Marvel when he was submitting freelance material to it from 1966 to 1973); Ex. 10 ¶ 12 (Richard Ayers (“Ayers”) attesting that he had no contract with Marvel from 1959 to 1975); Ex. 11 ¶ 9 (Colan attesting that he had no contract with Marvel until 1975); Ex. 13 ¶ 7 (Adams attesting that he had no contract with Marvel in the 1960s or 1970s); Ex. 17 at 39:25-40:4, 51:20-52:4 (Thomas testifying that he had no written contract from 1965 to 1974); Ex. 22 at 287:22-288:12 (Lieber testifying that he had no contract with Marvel in the 1950s or 1960s); Ex. 24 at 79:2-8 (Levitz testifying that Marvel did not have contracts with any freelancer until the mid-1970s).

18. **While it was understood that “Marvel” *owned* the work created by freelance writers/artists once it purchased and paid for such work, neither Magazine Management (nor Goodman’s shell companies) nor the freelancers viewed or intended their creations as “work made for hire” or “Marvel” as the “author” and owner of such work at the moment of its creation.** *See* Toberoff Decl. Ex. 8 ¶¶ 14-15 (Sinnott attesting that in the 1950s and 1960s, he did not consider his freelance work submitted to Marvel to be done as “work made for hire”); Ex. 9 ¶ 8 (Steranko attesting that no one at Marvel ever informed him that his work was being created as “work made for hire” from 1966 to 1973); Ex. 10 ¶ 13 (Ayers attesting that he thought Marvel owned his work because it bought the material he submitted, but that he never heard the term “work for hire” and did not think his work was created as “work made for hire”); Ex. 11 ¶ 12 (Colan attesting that he believed Marvel owned the work it purchased from him, but that he never heard the term “work for hire”); Ex. 13 ¶¶ 12-13 (Adams attesting that he did not consider the work he submitted to Marvel to be done as “work made for hire”); Ex. 21 at 97:3-23 (Steranko testifying that he believed that when he walked into Marvel to deliver his freelance material, he still owned the work and that his work belonged to him until he cashed the check Marvel wrote to him); Ex. 22 at 266:13-267:2 (Lieber testifying that he believed he owned his

freelance material until Marvel bought it from him); Ex. 54 at 2021MARVEL-0070259 (Marvel President James Galton (“Galton”) correspondence to Thomas dated February 24, 1978 stating “it was our intent that all copyrights be assigned to Marvel, I assume this is acceptable to you ... I would appreciate your signing ... to confirm that all right to claim renewal and extension of copyrights are assigned to Marvel”); Ex. 64 at 245 n.80 (Nimmer explaining in 1963 “that 17 U.S.C. Sec. 26 expressly renders an employer for hire an ‘author’ but makes no comparable provision with respect to commissioned works”).

19. **In June 1968, Goodman sold Magazine Management and all his shell companies to publicly traded Perfect Film and Chemical Corporation (“Perfect Film”) which was later renamed Cadence Industries (“Cadence”).** *See* Toberoff Decl. Ex. 1 at 17 (Evanier Rep. providing historical context of Marvel’s sale to Perfect Film in 1968, which was later renamed Cadence in 1973); Ex. 7 at 273:19-274:3 (Thomas testifying that Marvel was taken over by Perfect Film/Cadence); Ex. 17 at 246:1-12 (Thomas testifying that Perfect Film bought Marvel and later changed its name to “Cadence”); Ex. 24 at 37:5-18, 52:8-13 (Levitz testifying Marvel was a privately held company until it was sold to Perfect Film, which was a public company); Ex. 46 at 1-3 (list of Goodman’s shell companies drafted in preparation of the sale to Perfect Film, dated October 4, 1967).

20. **When it took over, Cadence sought to shore up Magazine Management’s assets.** *See* Toberoff Decl. Ex. 1 at 17 (Evanier Rep. describing historical context concerning Cadence’s difficult task of trying to solidify Marvel’s intellectual property assets after it purchased Marvel in the 1960s because of Marvel’s haphazard business practices in the 1950s and 1960s); Ex. 3 at 226:8-227:3 (Romita testifying that, when Cadence purchased Marvel, it came in and tried to nail down all the freelancers and rights to the works); Ex. 48 at (Certificate

of Registration of a Claim for Copyright dated August 31, 1964 for *Amazing Spider-Man Annual* Vol. 1, No. 1 filed by Magazine Management and identifying Lee as the “Author” and Non-Pareil as the “Copyright Claimant.” Compared to the Certificate of Renewal Registration for *Amazing Spider-Man Annual* Vol. 1, No. 1 filed by Cadence’s purported successor, Marvel Entertainment Group, dated December 15, 1992 and now claiming Lee as an “Employee for Hire of Non-Pareil”).

21. **Marvel did not ask any freelance creator to sign any contract until 1974.** *See* Toberoff Decl. Ex. 2 at 71:17-74:5 (Lieber testifying that he sold freelance work to Marvel in the 1950s and 1960s and had no contract with Marvel); Ex. 11 ¶ 9 (Colan attesting that he had no contract with Marvel until 1975); Ex. 9 ¶ 8 (Steranko attesting that he did not have a contract with Marvel while he was submitting freelance material to the company from 1966 to 1973); Ex. 17 at 39:25-40:4, 51:20-52:4 (Thomas testifying that he had no written contract from 1965 to 1974); *id.* at 298:8-14 (Thomas testifying that freelancers did not have contracts with Marvel until Thomas’s in 1974, which was the first); Ex. 24 at 79:2-8 (Levitz testifying that Marvel did not have contracts with any freelancer until the mid-1970s); Ex. 43 ¶ 7 (Marvel’s contract with Colan dated March 22, 1975); Ex. 44 ¶ 7 (Marvel’s contract with Roy Thomas dated September 1, 1974).

22. **These contracts contained assignment language only and no contract during this time used the term “work for hire” or identified Magazine Management/Cadence as the “author” of any of the works created by the freelancers who sold work to them.** *See* Toberoff Decl. Ex. 14 at 16-17 (Evanier Rebuttal Rep. explaining that it was the custom and practice of publishers seeking to be considered legal “authors” of “works-made-for-hire” to state so clearly and in writing); Ex. 8 ¶¶ 14-15 (Sinnott attesting that no Marvel contract used the term

“work for hire” until 1978 or 1979, and that no one at Marvel used that term in the 1960s); Ex. 9 ¶ 8 (Steranko attesting that no one at Marvel used the term “work made for hire” from 1966 to 1973); Ex. 11 ¶ 13 (Colan attesting that his 1975 contract with Marvel used assignment, not work-for-hire, language); Ex. 44 ¶ 7 (Marvel’s contract with Thomas dated September 1, 1974 using language of assignment, not work-for-hire); Ex. 17 at 60:3-10 (Thomas testifying that his 1974 contract (which contained assignment language) continued the previous pre-contract working arrangement); Ex. 43 ¶ 7 (Marvel’s contract with Colan dated March 22, 1975 using language of assignment, not work-for-hire); Ex. 53 ¶ 7 (Marvel’s contract with Thomas dated August 27, 1976 still using language of assignment, not work-for-hire); Ex. 52 ¶ 7 (Marvel’s October 7, 1977 contract with Stephen Gerber (“Gerber”) using language of assignment, not work-for-hire); Ex. 54 at 2021MARVEL-0070259 (Marvel President Galton correspondence to Thomas dated February 24, 1978 stating “it was our intent that all copyrights be assigned to Marvel, I assume this is acceptable to you ... I would appreciate your signing ... to confirm that all right to claim renewal and extension of copyrights are assigned to Marvel”); *compare* Ex. 47 ¶ 6 (unsigned Lancer Books contract with Don Rico dated December 15, 1966 with provision stating Lancer “shall be deemed the Author of the Work ... in view of the fact that [Rico was Lancer’s] employee for hire”).

23.     **The “work for hire” doctrine became the focus of attention when the 1976 Copyright Act established an explicit “work for hire” regime under which work by an independent contractor could be “made for hire,” under certain conditions.** *See* Toberoff Decl. Ex. 15 at 25 (Expert Report of Paul Levitz (“Levitz Rep.”) explaining that, once the 1976 Copyright Act was enacted, it was then that comic book publishers began using the term “work made for hire”); Ex. 20 at 160:8-162:14 (Evanier testifying that Cadence attempted to fit pre-

1978 works into the work-for-hire provision of the 1976 Copyright Act); Ex. 24 at 106:16-107:21 (Levitz testifying that people in the comic book industry began to talk about “work for hire” in the mid-1970s, as the Copyright Act of 1976 was coming into existence).

24. **Commencing in the late 1970s, Marvel/Cadence attempted to re-label the freelance material Marvel’s predecessors had purchased and published decades earlier as “work for hire,” even though such purchased material had theretofore not been treated or viewed as such by Marvel or the freelancers.** *See* Toberoff Decl. Ex. 1 at 17 (Evanier Rep. explaining Cadence’s practices of trying to fit prior freelance work purchased by Marvel into the “work-for-hire” provisions of the Copyright Act of 1976); Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 15 at 25 (Levitz Rep. explaining that, once the 1976 Copyright Act was enacted, it was only then that publishers began using the term “work made for hire”); Ex. 13 ¶ 15 (Adams attesting that Marvel started forcing freelancers to sign retroactive “work for hire” releases and other contracts in the late 1970s); Ex. 20 at 160:8-162:14 (Evanier testifying that Cadence tried to fit pre-1978 works into the work-for-hire provision of the 1976 Copyright Act); Ex. 39 (purported retroactive work-for-hire contract dated January 26, 1979 allegedly signed by Ditko); Ex. 48 at (Certificate of Registration of a Claim for Copyright dated August 31, 1964 for *Amazing Spider-Man Annual* Vol. 1, No. 1 filed by Magazine Management and identifying Lee as the “Author” and Non-Pareil as the “Copyright Claimant.” Compared to the Certificate of Renewal Registration for *Amazing Spider-Man Annual* Vol. 1, No. 1 filed by Cadence’s purported successor, Marvel Entertainment Group, dated December 15, 1992 and now claiming Lee as an “Employee for Hire of Non-Pareil”); Ex. 64 at 245 n.80 (Nimmer explaining in 1963 “that 17 U.S.C. Sec. 26 expressly renders an employer for hire an ‘author’ but makes no comparable provision with respect to commissioned works”).

25. **In the late 1970s, Marvel began insisting that freelancers sign contracts or acknowledgements that retroactively re-characterized as “work for hire,” decades after creation, all of the freelance material Marvel’s predecessors had purchased.** *See* Toberoff Decl. Ex. 11 ¶ 14 (Colan attesting that in 1978, he was forced to sign a contract stating that everything he had ever created and submitted to Marvel was done as “work made for hire”); Ex. 13 ¶ 15 (Adams attesting that Marvel started forcing freelancers to sign retroactive “work for hire” releases and other contracts in the late 1970s); Ex. 15 at 25 (Levitz Rep. explaining that, starting in 1977 or 1978, Marvel began to have freelancers sign “work made for hire” releases stating that all prior work had been submitted on a “work made for hire” basis); Ex. 20 at 160:8-162:14 (Evanier testifying that Cadence tried to fit pre-1978 works into the work-for-hire provision of the 1976 Copyright Act); Ex. 39 (retroactive work-for-hire contract dated January 26, 1979 allegedly signed by Ditko); Ex. 64 at 245 n.80 (Nimmer explaining in 1963 “that 17 U.S.C. Sec. 26 expressly renders an employer for hire an ‘author’ but makes no comparable provision with respect to commissioned works”).

26. **In the late 1970s and 1980s, after Marvel’s competitor, DC Comics, began returning to freelancers their physical art (as opposed to the copyrights therein) so the freelancers could improve their uncertain and unstable financial situations by selling autographed art to fans, Marvel was under pressure to do the same.** *See* Toberoff Decl. Ex. 1 at 23 (Evanier Rep. describing DC Comics and other publishers’ practice of returning artwork to the freelancers who created it); Ex. 6 at 82:2-12 (Thomas testifying that Marvel returned artwork to give artists extra income and to enhance goodwill); Ex. 9 ¶¶ 15-16 (Steranko attesting that Marvel began to return artwork to freelancers to avoid paying sales taxes on its purchase of such material and that freelancers welcomed the extra source of income); Ex. 10 ¶ 15 (Ayers attesting

that he signed artwork releases because he needed the extra income).

27. **But Marvel withheld the art and conditioned its return on the freelancers signing purported retroactive releases and acknowledgements that the freelance art they had created decades earlier was all “work made for hire.”** *See* Toberoff Decl. Ex. 1 at 24 (Evanier Rep. describing Marvel’s practice of returning artwork to the freelancers who created it on condition that freelancers sign “work-for-hire” releases); Ex. 9 ¶ 16 (Steranko attesting that Marvel returned artwork, but made freelancers sign releases recharacterizing their work as “work made for hire”); Ex. 13 ¶ 15 (Adams attesting that Marvel started forcing freelancers to sign retroactive “work for hire” releases and other contracts in the late 1970s); Ex. 20 at 160:8-162:14 (Evanier testifying that Cadence tried to fit pre-1978 works into the work-for-hire provision of the 1976 Copyright Act); Ex. 37 at 2021MARVEL-0054634-005636 (sample 1979-1980 artwork releases retroactively claiming the returned artwork was done by Marv Wolfman as an “employee-for-hire”).

28. **In the early 1980s, Marvel ran a competition for aspiring artists and writers, open to the public.** *See* Toberoff Decl. Ex. 1 at 17 (Evanier Rep. describing Marvel’s practice of running competitions to discover new, aspiring artist and writers); Ex. 34 at 1 (Randy Schueller (“Schueller”) interview explaining that Marvel ran a competition for aspiring writers and artists in the early 1980s).

29. **One entrant, Randy Schueller, an amateur and previously unknown writer/artist, submitted a story wherein Spider-Man had a stealthy black costume instead of his usual red, black, and blue.** *See* Toberoff Decl. Ex. 1 at 17 (Evanier Rep. describing Schueller’s unique Spider-Man submission and his amateur status); Ex. 31 at 2 (Walter Durajlija (“Durajlija”) writing that young fan Schueller won an ideas contest Marvel was having in 1982



with his idea for a black Spider-Man costume); Ex. 34 at 2 (Schueller interview explaining that he came up with, and submitted to Marvel, a story featuring a black-costume Spider-Man).

30. **A few months after Schueller’s submission, then Marvel editor, Jim Shooter (“Shooter”), wrote to Schueller on August 3, 1982, offering to buy the story for \$220 and told him to sign a “Work-made-for-hire Agreement.”** *See* Toberoff Decl. Ex. 17 at 59:2-10 (Thomas testifying that Jim Shooter was editor-in-chief at Marvel in the 1980s); Ex. 31 at 2 (Durajlija writing that Marvel editor Shooter liked the costume idea and bought it from Schueller for \$220); Ex. 32 (Shooter letter dated August 3, 1982 offering to buy Schueller’s black-costume *Spider-Man* story submission for \$220 and telling Schueller to sign the attached “Work-made-for-hire Agreement”); Ex. 34 at 2 (Schueller interview explaining that, a few months after he submitted his black-costume *Spider-Man* story, Shooter wrote to him offering to buy it for \$220); Ex. 38 (retroactive work-for-hire agreement signed by Schueller dated August 9, 1982).

31. **Schueller signed the agreement on August 9, 1982, which is the same form agreement Marvel had other freelancers sign in and around 1978.** *See* Toberoff Decl. Ex. 1 at 17 (Evanier Rep. identifying Schueller’s August 9, 1982 contract as being the same as those Marvel forced freelancers to sign in the late 1970s); Ex. 38 (retroactive work-for-hire agreement signed by Schueller dated August 9, 1982); Ex. 39 (retroactive work-for-hire contract dated January 26, 1979 allegedly signed by Ditko).

32. **Schueller’s “agreement” retroactively provided that “all work ... which have been or are in the future created ... [were] to be considered a work made for hire.”** *See* Toberoff Decl. Ex. 38 (purported retroactive work-for-hire agreement signed by Schueller dated August 9, 1982).

33. **Ditko was a prolific comic book creator and illustrator who revolutionized**

**the artform, and created or co-created, in the Period, some of Marvel’s most enduring and profitable superheroes including, without limitation, Spider-Man and Dr. Strange.** *See*

Toberoff Decl. Ex. 17 at 17:8-23 (Thomas testifying that Ditko and others revolutionized comics with their characters and style); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas Steve[] [Ditko’s] idea,” in a letter dated January 9, 1963); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the story plotting of *Spider-Man*).

34. **Unlike most freelancers in the Period who worked from home, Ditko worked out of a separate art studio he rented at his own expense.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. explaining the custom and practice of freelancers creating their material from home and noting that Ditko was unique in renting and paying for a separate studio); Ex. 2 at 76:4-24 (Lieber testifying that he created his freelance work from home and used his own supplies); Ex. 3 at 16:22-24, 194:14-195:3, 209:16-210:7 (Romita testifying that he purchased his own materials and worked from home); Ex. 4 at 33:25-34:2 (Lee testifying that freelancers mostly worked from home); Ex. 6 at 30:21-24 (Thomas testifying that he did his freelance writing from home); Ex. 8 ¶ 9 (Sinnott attesting that he worked from home and paid for his own materials); Ex. 9 ¶ 10 (Steranko attesting that he worked from home and paid for his own materials, for which Marvel never reimbursed him); Ex. 10 ¶ 10 (Ayers attesting that he worked from home and paid for his own materials); Ex. 11 ¶ 8 (Colan attesting that he created his freelance art from home and paid for his own materials); Ex. 13 ¶ 7 (Adams attesting that he worked from home and paid for his own materials); Ex. 16 at 117:15-16 (Nanci Solo (“Solo”) testifying that Colan worked from home); Ex. 17 at 24:5-25:4 (Thomas testifying that artists

worked from home as freelancers and rarely, if ever, came into the office); Ex. 22 at 286:17-287:19 (Lieber testifying that he worked from home and paid for his own typewriter); Ex. 24 at 123:18-21 (Levitz testifying that Ditko created work from his own studio).

35. **Ditko also paid for all his own materials and instruments, including paper, pens, pencils, erasers, brushes and ink.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. explaining that it was the custom and practice in the comic book industry, and at Marvel, in the 1960s for freelancers to pay for their own materials including paper, pencils, ink, pens, brushes); Ex. 2 at 76:4-24 (Lieber testifying that he created his freelance work from home and used his own supplies); Ex. 3 at 16:22-24, 194:14-195:3, 209:16-210:7 (Romita testifying that he purchased his own materials and worked from home); Ex. 8 ¶ 9 (Sinnott attesting that he worked from home and paid for his own materials); Ex. 9 ¶ 10 (Steranko attesting that he worked from home and paid for his own materials, for which Marvel never reimbursed him); Ex. 10 ¶ 10 (Ayers attesting that he worked from home and paid for his own materials); Ex. 11 ¶ 8 (Colan attesting that he created his freelance art from home and paid for his own materials); Ex. 13 ¶ 7 (Adams attesting that he worked from home and paid for his own materials); Ex. 17 at 294:6-295:3 (Thomas testifying that freelancers paid for their own materials, paper, typewriter, and work from home); Ex. 21 at 97:3-23 (Steranko testifying that he paid for his own materials); Ex. 22 at 286:17-287:19 (Lieber testifying that he worked from home and paid for his own typewriter).

36. **Ditko created his freelance artwork solely as an independent contractor on his own time, and at his own volition with the intention and hope of selling his material to Magazine Management, Charlton Comics, or other publishers.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. explaining that it was the custom and practice in the comic book industry, and

at Marvel, in the 1960s for freelancers to create their material as independent contractors and to set their own hours and choose their own working conditions); Ex. 12 ¶ 18 (Evanier attesting that Ditko was submitting freelance *Spider-Man* material to Marvel but was also selling work to Charlton Comics at the same time); Ex. 23 at 160:2-8 (Mark Ditko testifying that his uncle Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics).

37. **None of Ditko’s expenses in creating his works were paid for or reimbursed, whether by Magazine Management, or by the shell companies that copyrighted the comic books publishing Ditko’s works.** See Toberoff Decl. Ex. 1 at 13 (Evanier Rep. explaining that it was the custom and practice in the comic book industry, and at Marvel, in the 1960s for freelancers to pay for their own materials including paper, pencils, ink, pens, brushes); Ex. 2 at 76:4-24 (Lieber testifying that he created his freelance work from home and used his own supplies); Ex. 3 at 16:22-24, 194:14-195:3, 209:16-210:7 (Romita testifying that he purchased his own materials and worked from home); Ex. 8 ¶ 9 (Sinnott attesting that he worked from home and paid for his own material); Ex. 9 ¶ 10 (Steranko attesting that he worked from home and paid for his own materials, for which Marvel never reimbursed); Ex. 10 ¶ 10 (Ayers attesting that he worked from home and paid for his own materials); Ex. 11 ¶ 8 (Colan attesting that he created his freelance art from home and paid for his own materials); Ex. 13 ¶ 7 (Adams attesting that he worked from home and paid for his own materials); Ex. 17 at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know “of [them] having any existence” whatsoever); Ex. 21 at 97:3-23 (Steranko testifying that he worked out of his own

studio and paid for his own materials); Ex. 22 at 286:17-287:19 (Lieber testifying that he worked from home and paid for his own typewriter); Ex. 50 at DETTWILER-0044-0058 (Don Heck's payment records identifying "Magazine Management" as the entity that paid him for his freelance pages in the Period).

38. **Ditko kept a large chart in his studio, mapping out the future development of his characters so he could plant narrative seeds and introduce elements in current comic book issues whose importance would be revealed and come to fruition much later in issues many months down the line.** *See* Toberoff Decl. Ex. 1 at 12 (Evanier Rep. describing Ditko's regular practice of maintaining a chart mapping out the future development of a character so he could introduce elements into current issues and then use those elements in issues many months down the line); Ex. 35 at DITKO-0193 (Ditko writing that he planted seeds of subplots in stories that would work their way through the issues until it was time for those sub-stories to play an active role later when the time was right); Ex. 58 at 3 (Ditko writing when he took over the *Spider-Man* stories he "knew in advance the [*Spider-Man*] story line like the best (worst) time for Aunt May to have a heart attack").

39. **When submitting his artwork to Lee, Ditko would often write extensive notes, including suggested captions and dialogue, so that when Lee, or later, Thomas, dialogued Ditko's story, they would know what story points Ditko intended in each panel and what the characters would likely say consistent with the story Ditko had plotted.** *See* Toberoff Decl. Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko's practice of submitting detailed notes with his freelance material to assist Lee in dialoguing the stories); Ex. 7 at 223:18-225:20 (Thomas testifying that Ditko refused to speak to Lee while working on *Spider-Man* and *Dr. Strange* so all plotting on the stories was done by Ditko, and further, that Ditko would

provide margin notes to indicate what he intended to happen in the story to guide Lee when Lee dialogued the story); *id.* at 262:4-264:19 (Thomas testifying that when he began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 17 at 84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); Ex. 18 (1965 example of Ditko's *Dr. Strange* margin notes for Thomas); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue [in the balloons]); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script).

40. **Ditko, in essence, acted as both a co-writer/plotter and the artist of his stories. Lee, or later sometimes, staff writer Thomas, would then dialogue the balloons and add some captions based on Ditko's illustrated story, notes, and suggestions.** *See* Toberoff Decl. Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); *id.* at 262:4-264:19 (Thomas testifying that, when Thomas began to dialogue *Dr. Strange* stories instead of Lee, Ditko would type his suggested captions and dialogue on a separate page, not in the margins, and then give them to Thomas to fill in the dialogue balloons); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko, on his own, plotted and drew *Spider-Man* for more than one year before he left in 1966, did not work pursuant to the Marvel Method, and that Lee would not even know anything about the story until it was penciled and submitted by Ditko); *id.* at

84:18-90:9 (Thomas testifying that Ditko wrote extensive margin notes describing the plot and what was happening so that when Lee/Thomas dialogued the story, they could do so in a way that corresponded with what Ditko had intended); Ex. 18 (1965 example of Ditko's *Dr. Strange* margin notes for Thomas); Ex. 19 at 6-8 (Thomas interview explaining that Ditko and Lee were not speaking in 1965 and Ditko was plotting both *Spider-Man* and *Dr. Strange* and would only come to the office to drop work off with Brodsky); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 28 (Lee writing that Ditko was the co-creator of *Spider-Man* and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and some captions).

41. **In the Period, Ditko was paid neither a fixed wage nor for his services, but was paid only for that material Magazine Management chose to purchase subsequent to its creation.** See Toberoff Decl. Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel's custom and practice of purchasing freelance work by the page, and not paying freelancers fixed wages or for their services or time); Ex. 14 at 3 (Evanier Rebuttal Rep. explaining the custom and practice of comic book publishers in the Period, including at Marvel, to pay for only those pages they chose to accept and purchase, and to not pay for a freelancer's time or services); Ex. 5 at 371:3-25 (Lee testifying that Marvel "would only buy what [it] needed"); Ex. 8 ¶ 11 (Sinnott attesting that Marvel only paid him for the pages it accepted); Ex. 9 ¶ 14 (Steranko attesting that he was only paid for the pages Marvel accepted); Ex. 10 ¶ 11 (Ayers attesting that he was paid per page for freelance material which Marvel accepted); Ex. 13 ¶¶ 9-11 (Adams attesting that Marvel only paid him for pages which it accepted); Ex. 17 at 292:24-

293:15 (Thomas testifying that freelancers were only paid for the final, accepted page); Ex. 43 ¶ 3(a) (Marvel's contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel's contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel's contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel's October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber "will make all changes and rework all Material ... without charge").

42. **If work was rejected, Ditko was not compensated, and personally took the loss for his time, materials and associated overhead in creating the work.** *See* Toberoff Decl. Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel's custom and practice of not paying freelancers for material they rejected); Ex. 14 at 3, 7 (Evanier Rebuttal Rep. explaining the custom and practice in the comic book industry in the Period, including at Marvel, to not pay for any freelance material rejected by the publishers); Ex. 2 at 100:3-101:9 (Lieber testifying about a time he witnessed Kirby's work being rejected and Kirby tearing up and throwing away the rejected pages); Ex. 10 ¶ 11 (Ayers attesting that was not paid for rejected material or for having to redo material); Ex. 11 ¶ 9 (Colan attesting that Marvel only paid for the pages it accepted); Ex. 13 ¶¶ 8, 10-11 (Adams attesting that he bore the risk of creation because there was no guarantee his work would be purchased by Marvel); Ex. 15 at 22-23 (Levitz Rep. explaining that it was the custom and practice for comic book publishers to have the right to reject work submitted by freelancers and to pay only for the pages which were accepted); Ex. 16



at 117:6-121:4 (Solo testifying that Colan was not paid for rejected work and that her father was so upset by this periodic waste of his efforts that he would commonly use the rejected, unpaid-for pages of artwork to pick up their family dog's feces); Ex. 17 at 295:8-296:8, 297:1-20 (Thomas testifying that Marvel could accept or reject submitted freelance material in its sole discretion); Ex. 20 at 73:14-74:24 (Evanier testifying that Marvel had asked Evanier to submit some work in the 1970s prior to 1978, for a new magazine, but that after he did the work, Marvel declined to buy it or pay for it since it decided not to publish the magazine after all); Ex. 21 at 29:9-30:17 (Steranko testifying that Lee sometimes rejected the work Steranko submitted on spec); Ex. 22 at 155:17-156:4, 259:5-16, 267:5-269:21 (Lieber testifying that he was only paid for work that was accepted by Marvel and recalls at least one instance where he submitted a plot which Marvel rejected and did not pay for); Ex. 24 at 14:12-19, 104:16-105:11 (Levitz testifying that Marvel had the right to reject material and not pay for it); Ex. 43 ¶ 3(a) (Marvel's contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel's contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel's contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel's October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber "will make all changes and rework all Material ... without charge").

**43. If Ditko was asked to redraw a page(s), he was not compensated for the extra labor or materials, necessary to make such changes, but was paid only for the final,**

**completed page(s) Magazine Management decided to buy.** *See* Toberoff Decl. Ex. 1 at 15 (Evanier Rep. describing the comic book industry and Marvel’s custom and practice of not paying freelancers to revise or redraw a page, as freelancers were only paid for the final pages the publisher decided to accept and purchase); Ex. 14 at 7 (Evanier Rebuttal Rep. explaining the custom and practice in the comic book industry, including at Marvel, for publishers to not pay for rejected material, or to pay a freelancer to make revisions to his material); Ex. 2 at 102:15-105:17 (Lieber testifying he was not paid for redoing work and that he was only paid for the final pages Marvel accepted); Ex. 8 ¶ 13 (Sinnott attesting that Marvel only paid for the final pages that were sold to Marvel, not for any changes or rejected work); Ex. 9 ¶ 14 (Steranko attesting he was not compensated for having to redo any work); Ex. 10 ¶ 11 (Ayers attesting that he was not paid for rejected material or for having to redo material); Ex. 11 ¶¶ 9, 11 (Colan attesting that Marvel did not pay him for redoing work); Ex. 13 ¶¶ 10-11 (Adams attesting that he was only paid for pages Marvel accepted); Ex. 17 at 142:21-143:15, 296:10-25 (Thomas testifying that freelancers were not paid for having to redo or revise pages and that they would only be paid for the final, accepted page); Ex. 43 ¶ 3(a) (Marvel’s contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel’s contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel’s contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel’s October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber “will make all changes and rework all Material ... without charge”).

44. **Ditko often refused to make changes to his work outright, and in that event, any changes Lee wanted were either ignored, or had to be made by a production assistant after Ditko had sold his work to Magazine Management.** *See* Toberoff Decl. Ex. 14 at 7 (Evanier Rebuttal Rep. explaining Ditko’s practice of refusing to make changes and in such case, Marvel’s custom of having staff make such changes after the work had been submitted to and purchased by Marvel); Ex. 3 at 75:18-20, 243:13-244:23, 246:5-9 (Romita testifying that he, or someone else Lee could find in the Marvel office, would be asked to make changes to other artists’ work after it had been submitted and would not be paid any extra for making these changes and noting specifically that when Lee did not like something on a Ditko cover, he asked Kirby to change it); Ex. 19 at 6, “Legends at Loggerheads!” (Thomas explaining example of when Lee incorrectly dialogued a *Spider-Man* story in a way Ditko had not intended, Ditko refused to accede to Lee’s chosen direction); Ex. 21 at 41:7-18 (Steranko testifying that Marvel had production assistants to make changes to work after it had been submitted by artists); Ex. 35 at DITKO-0193 (Ditko writing that he ignored comments from Lee and Brodsky and only made changes to stories when he agreed with them).

45. **Magazine Management did not withhold any taxes, nor provide Ditko with any security or employment benefits.** *See* Toberoff Decl. Ex. 1 at 12 (Evanier Rep. describing the comic book industry and Marvel’s custom and practice of publishers not withholding payroll taxes, nor providing health insurance or employment benefits to freelancers in the Period); Ex. 2 at 79:5-80:9 (Lieber testifying that Marvel did not withhold any taxes or pay for any health benefits for freelancers); Ex. 9 ¶ 10 (Steranko attesting that Marvel did not withhold any taxes or provide any employment benefits to him from 1966 to 1973); Ex. 13 ¶ 10 (Adams attesting that Marvel did not withhold any taxes or provide him with any employment benefits).

46. **Ditko, as an independent artist, was free to sell, and did sell, work to other publishers, like Charlton Comics, while also selling his work to Magazine Management.** *See* Toberoff Decl. Ex. 1 at 10 (Evanier Rep. describing the common practice of freelancers selling material to more than one publisher, including Marvel, DC Comics, and Charlton Comics); Ex. 3 at 207:12-22 (Romita testifying that freelancers were free to sell work to other publishers); Ex. 9 ¶ 11 (Steranko attesting that Marvel had no contract with Steranko and so he was free to sell work to other publishers); Ex. 13 ¶¶ 5-6 (Adams attesting that he sold work to both Marvel and DC Comics during the 1960s and 1970s); Ex. 17 at 298:8-14, 301:14-303:7 (Thomas testifying that Marvel did not have contracts with freelancers prohibiting them from selling work to other publishers); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics).

47. **On the occasions when Ditko and Lee would exchange story ideas, Ditko was free to incorporate ideas from the exchange or to reject them altogether.** *See* Toberoff Decl. Ex. 14 at 11, 13 (Evanier Rebuttal Rep. explaining the custom and practice of comic book publishers to reserve the right to purchase or not purchase freelancers' submitted material, and that freelancers were free to decline to make changes to their work); Ex. 35 at DITKO-0192, DITKO-0207-0210, DITKO-0215-0218 (Ditko writing that he rejected several of Lee's *Spider-Man* story ideas and characters such as, for instance, Lee's idea for a Spider-Woman character, or Lee's idea of making Aunt May more glamorous); Ex. 58 at 4 (Ditko writing that he "refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it").

48. **If Ditko did not wish to work on a project offered to him by "Marvel," he**

**was free to decline it without consequence.** *See* Toberoff Decl. Ex. 14 at 11, 13 (Evanier Rebuttal Rep. explaining the custom and practice of comic book publishers to reserve the right to purchase or not purchase freelancers’ submitted material and for freelancers to be free to sell work to comic book publishers if they so chose); Ex. 3 at 219:12-24 (Romita testifying that he turned down Lee’s offer to submit material to Marvel and preferred to sell freelance work to DC Comics); Ex. 21 at 29:9-30:17 (Steranko testifying that he was not given “assignments,” but rather, he had the option to work on some books or to not if he chose not to); Ex. 24 at 89:2-11 (Levitz testifying that freelancers were free to decline “assignments”); Ex. 58 at 4 (Ditko writing that, after he stopped selling his material to Marvel in 1966, he later started working with Marvel again, but refused to do any *Spider-Man* or *Dr. Strange* stories and recounting that when other writers tried to sneak in *Spider-Man* panels for Ditko to work on, he “left [them] blank for someone else to fill in”); *id.* (Ditko writing that he “refused to do a drunken Iron Man splash page—someone else had to draw [and] ink it”).

49. **Ditko, an extremely independent-minded artist, supervised himself, edited his own work, and created the Works after little or no discussion with Lee.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing the common practice of independent freelancers supervising themselves and editing their own work prior to submission); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking and that Ditko never received any plots from Thomas when Thomas was doing the dialoguing on *Dr. Strange*); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko plotted and drew *Spider-Man* stories completely on his own for more than one year before he left in 1966); Ex. 25 at DITKO-0308 (Ditko explaining that *Dr. Strange* was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 26 at 83

(Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue [in the balloons]); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script).

50. **In 1964, Ditko and Lee had a falling out over the future direction of the *Spider-Man* stories and they refused to speak anymore.** See Toberoff Decl. Ex. 7 at 223:18-224:13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking); Ex. 17 at 311:2-17 (Thomas testifying that, by the time he started at Marvel in mid-1965, Ditko and Lee were not speaking anymore because they had been fighting over the direction of the *Spider-Man* series); Ex. 24 at 124:5-24 (Levitz testifying that Ditko and Lee stopped speaking in the last year of Ditko's time with Marvel because Ditko was not getting proper credit for his contributions to the stories); Ex. 35 at DITKO-0193 (Ditko writing that he and Lee stopped speaking around 1964); Ex. 58 at 3 (Ditko writing that he took over all plotting of the *Spider-Man* stories).

51. **From that point until Ditko stopped selling his work to Marvel in early 1966, Ditko was in complete creative control over how he plotted and drew his stories, leaving Lee (and Magazine Management) with little or no control over the stories, aside from Lee's dialoguing the balloons.** See Toberoff Decl. Ex. 7 at 223:18-224:13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* and *Dr. Strange* stories while he and Lee were not speaking); Ex. 17 at 29:19-30:8, 83:13-18 (Thomas testifying that by the time Thomas began at Marvel in mid-1965, Ditko was plotting and penciling *Dr. Strange* stories, which Thomas would dialogue); *id.* at 92:9-20 (Thomas testifying that Ditko stopped working with Marvel around Christmas 1965); Ex. 25 at DITKO-0308 (Ditko explaining that *Dr. Strange* was his creation and

soon he was doing all the stories, writing, and art for it); Ex. 26 at 83 (Lee writing that Ditko came up with the *Dr. Strange* plots and illustrated the story and Lee only added the dialogue to the balloons); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 35 at DITKO-0189 (Ditko writing that he left Marvel in 1966); *id.* at DITKO-0193 (Ditko writing that he and Lee stopped speaking around 1964 and thus from then on, Ditko had complete creative control of the *Spider-Man* and *Dr. Strange* stories, which he was plotting and penciling until he left in 1966).

52. **Ditko had no employment or other contract during the Period with Magazine Management or any other alleged Marvel predecessor.** *See* Toberoff Decl. Ex. 36 at 7 (Marvel admitting it had no written contract with Ditko in the 1960s); Ex. 17 at 298:8-14 (Thomas testifying that freelancers did not have contracts with Marvel until Thomas's in 1974, which was the first); Ex. 64 at 245 n.80 (Nimmer explaining in 1963 "that 17 U.S.C. Sec. 26 expressly renders an employer for hire an 'author' but makes no comparable provision with respect to commissioned works").

53. **Ditko had no contact or relationship with any one of the shell companies (i.e., Vista, Atlas, Non-Pareil) which purported to copyright the comic book magazines in which Ditko's works appeared.** *See* Toberoff Decl. Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that the shell companies had no employees, offices, or business activities, and had no contact with any freelancer); Ex. 17 at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that he did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or "of [them] having any existence" whatsoever); Ex. 22 at 252:23-254:24, 303:15-19

(Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck's payment records identifying "Magazine Management" as the only entity that paid him for his freelance material in the Period).

54. **Ditko received no direction or communication from any of the shell companies (i.e., Vista, Atlas, Non-Pareil) or any employee of theirs, as these entities had none, nor was Ditko ever paid by any of the shell companies.** *See* Toberoff Decl. Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that the shell companies had no employees, offices, or business activities, and had no contact with any freelancer); Ex. 17 at 138:3-139:2 (Thomas testifying that Magazine Management was the only payor of staff/freelancer checks); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or "of [them] having any existence" whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck's payment records identifying "Magazine Management" as the only entity that paid him for his freelance material in the Period).

55. **When Lee composed the final captions and dialogue he too did so as a freelancer, not as Marvel's editor, as writing was not part of his editorial function.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee's common practice of composing dialogue as a freelancer, not as Marvel's editor and doing his freelancing from home two of the



five workdays per week, for which he was paid on a per-page basis as a freelancer); Ex. 3 at 41:19-42:2 (Romita testifying that Lee would stay home several days per week to write); Ex. 4 at 17:17-25 (Lee testifying that he was paid as a freelancer for his writing and was on salary for his work as an editor); Ex. 17 at 27:2-18, 30:9-13, 31:22-32:7, 276:2-14 (Thomas testifying that he was a staff writer/assistant editor in the 1960s and got a salary for that work, but separately freelanced when writing stories and was paid at a per-page rate on a separate check like other freelancers); Ex. 22 at 255:10-256:6 (Lieber testifying that Lee wrote stories and scripts as a writer, not as an editor, because writing is “not what an Editor does”); Ex. 55 at 62:18-63:18 (Lee testifying that he got paid a salary as editor and separately for his writing); Ex. 56 at 91:20-92:6 (Lee testifying that he got paid a salary as editor and separately as a freelancer per page for his writing); *id.* at 94:6-95:18 (Lee testifying that there was very little editing of his own freelance written material).

56. **Lee did his writing at home and his editor’s salary did not cover his writing, for which was paid by the page on a freelance basis.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee’s common practice of composing dialogue as a freelancer, not as Marvel’s editor and doing his freelancing from home two of the five workdays per week, for which he was paid on a per-page basis as a freelancer); Ex. 4 at 17:17-25 (Lee testifying that he was paid as a freelancer for his writing and was on salary for his work as an editor); Ex. 6 at 30:21-31:9 (Thomas testifying that Lee did his freelance writing from home); Ex. 17 at 289:7-291:5 (Thomas testifying that he and Lee each did their writing in a freelance capacity from home in the 1960s and would come to the office only to do their editorial work); Ex. 22 at 256:7-257:12 (Lieber testifying that Lee wrote scripts from home); Ex. 55 at 62:18-63:18 (Lee testifying that he got paid a salary as editor and separately for his writing); Ex. 56 at 91:20-92:6 (Lee testifying

that he got paid a salary as editor and separately as a freelancer pre page for his writing).

57. **During the Period, it was Magazine Management's policy that those employed in editorial or production roles, who also created material as artists or writers, did the latter on a freelance basis, on their own time, usually at home, and were paid only for those pages the publisher chose to buy and not paid for rejected pages, all in the publisher's sole discretion.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee's common practice of composing dialogue as a freelancer, not as Marvel's editor and doing his freelance writing from home two of the five workdays per week, and was paid on a per-page basis as a freelancer); Ex. 17 at 289:7-291:5 (Thomas testifying that he and Lee each did their freelance writing from home in the 1960s and would come to the office only to do their editorial work); *id.* at 27:2-18, 30:9-13, 31:22-32:7, 276:2-14 (Thomas testifying that he was a staff writer/assistant editor in the 1960s and got a salary for that work, but separately freelanced when writing stories and was paid at a per-page rate with a separate check like other freelancers); Ex. 44 ¶ 3(a) (Marvel's contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation).

58. **Lee went into Magazine Management's office to serve as editor only two or three of the five workdays each week, so he could do his freelance writing at his home.** *See* Toberoff Decl. Ex. 1 at 13 (Evanier Rep. describing Lee's common practice of composing dialogue as a freelancer, not as Marvel's editor and doing his freelancing from home 2 of the 5 workdays per week, and was paid on a per-page basis as a freelancer); Ex. 3 at 41:19-42:2 (Romita testifying that Lee would stay home several days per week to write); Ex. 17 at 289:7-291:5 (Thomas testifying that he and Lee each freelance wrote from home in the 1960s and

would come to the office to do their editorial work); Ex. 22 at 256:7-257:12 (Lieber testifying that Lee would do his writing from home).

59. **Magazine Management was the only entity that bought work from freelance writers/artists or employed editors like Lee in the Period.** *See* Toberoff Decl. Ex. 17 at 272:23-275:2 (Thomas testifying that he was paid and employed by Magazine Management/Marvel Comics, and then Perfect Film/Cadence); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period).

60. **The shell companies (e.g., Vista, Atlas, Non-Pareil) had no legal or corporate affiliation to one another or to Magazine Management.** *See* Toberoff Decl. Ex. 46 at 1-3 (list of Goodman’s shell companies dated October 4, 1967 showing no legal or corporate relationship to one another or Magazine Management); Ex. 17 at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Lens Decl., Ex. 18 72:25-73:11 (Goodman discussing his publishing entities, explaining that

“each corporation st[ood] on its own”).

61. **These shell companies—which Marvel later represented in the copyright renewal registrations of its comic books (featuring Ditko’s works) were the “authors” of the material as “works made for hire”—made no payments to, and had no interaction whatsoever with the freelance writers/artists, including Ditko, who created the original material in comic books.** See Toberoff Decl. Ex. 14 at 4-5 (Evanier Rebuttal Rep. providing historical context and explaining that the shell companies had no employees, actual offices, or business activities, and had no contact with any freelancer); Ex. 6 at 200:2-24 (Thomas testifying that he was hired by Magazine Management in 1965); Ex. 17 at 272:23-275:2 (Thomas testifying that he was paid and employed by Magazine Management/Marvel Comics, and then Perfect Film/Cadence); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 40 at 2021MARVEL-0005845 (Certificate of Renewal Registration of *Amazing Fantasy* Vol. 1, No. 15, the issue in which Spider-Man originally appeared, dated November 20, 1990, claiming “Atlas Magazines, Inc.” as the original author and copyright claimant); Ex. 41 at 2021MARVEL-0005849 (Certificate of Renewal Registration of *Amazing Spider-Man* Vol. 1, No. 1 dated November 20, 1990, claiming “Non-Pareil Publishing Corporation” as the original author and copyright claimant); Ex. 42 (Certificate of Renewal Registration of *Strange Tales* Vol. 1, No. 110, the issue in which Dr. Strange first appeared, dated December 27, 1991, claiming “Vista Publications,

Inc.” as the original author and copyright claimant); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period).

62. **Lee was only ever paid by Magazine Management for his editorial services and by the page for his freelance writing.** *See* Toberoff Decl. Ex. 17 at 138:3-139:2 (Thomas testifying that Magazine Management was the only payor of staff salaries and freelancer checks); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period).

63. **Ditko was not employed by, did not work for, nor did he have any contact with any of the shell companies.** *See* Toberoff Decl. Ex. 17 at 272:23-275:2 (Thomas testifying that he was paid and employed by Magazine Management/Marvel Comics, and then Perfect Film/Cadence); *id.* at 320:10-322:14 (Thomas testifying that no one knew what Vista, Atlas, or Non-Pareil did and that Thomas did not receive any money from them, does not know anyone who did, does not know if they had any employees or any offices, or “of [them] having any existence” whatsoever); Ex. 22 at 252:23-254:24, 303:15-19 (Lieber testifying that he never heard of Vista or other shell companies, did not know if they had any employees and that he was paid by, and believed he was working with, Magazine Management).

64. **Freelancers in the Period were paid with a Magazine Management check for those freelance pages the publisher chose to purchase in its sole discretion.** *See* Toberoff Decl. Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 5 at 371:3-25 (Lee testifying that Marvel “would only buy what [it] needed”); Ex. 17 at 295:8-296:8, 297:1-20 (Thomas testifying that Marvel could accept or reject submitted material in its sole discretion); Ex. 22 at 303:15-19 (Lieber testifying he thought the name on the checks was Marvel or Magazine Management); Ex. 43 ¶ 3(a) (Marvel’s contract with Colan dated March 22, 1975 providing that Colan would be paid only for those pages which Marvel accepted and requiring Colan to make changes to his work without any additional compensation); Ex. 44 ¶ 3(a) (Marvel’s contract with Thomas dated September 1, 1974 providing that Thomas would be paid only for those pages which Marvel accepted and requiring Thomas to make changes to his work without any additional compensation); Ex. 53 ¶ 3(a) (Marvel’s contract with Thomas dated August 27, 1976 with same provision); Ex. 52 ¶ 3(a) (Marvel’s October 7, 1977 contract with Gerber providing Gerber would be paid only for those pages Marvel accepted and that Gerber “will make all changes and rework all Material ... without charge”); Ex. 45 at KIRBY-4142-4154, KIRBY-4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975); Ex. 50 at DETTWILER-0044-0058 (Don Heck’s payment records identifying “Magazine Management” as the only entity that paid him for his freelance material in the Period); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”).

65. **Magazine Management stamped endorsement legends on the back of its checks, forcing freelancers to sign under the legend to cash them.** *See* Toberoff Decl. Ex. 1 at 16 (Evanier Rep. describing the comic book industry and Marvel’s custom and practice of stamping legends on the backs of checks to freelancers in the Period, thereby forcing freelancers to sign the legend to cash the check); Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 8 ¶ 13 (Sinnott attesting that Marvel paid him with checks that had an assignment legend on the back); Ex. 21 at 63:10-64:17, 91:11-93:19 (Steranko testifying that would cross out the legend on the backs of the Marvel checks because he thought it was bad business to add an after-the-fact condition to payment on work that had been submitted a week or two prior); Ex. 45 at KIRBY-4142-4154, KIRBY-4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975, with assignment legends stamped on the backs of the checks); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”).

66. **Magazine Management’s check legends acknowledged the freelancer’s contemporaneous “assignment to it of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright.”** *See* Toberoff Decl. Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by checks stamped with a legend that used assignment-type language); Ex. 8 ¶ 13 (Sinnott attesting that Marvel paid him with checks that had an assignment legend on the back); Ex. 9 ¶ 13 (Steranko attesting that legends on the backs of Marvel’s checks to him used assignment, not

work-for-hire, language); Ex. 10 ¶ 14 (Ayers attesting that Marvel’s check legends used assignment language); Ex. 11 ¶ 12 (Colan attesting that the legends on the backs of Marvel’s checks used assignment, not work-for-hire, language); Ex. 13 ¶ 14 (Adams attesting that Marvel’s check legends used assignment language only); Ex. 21 at 61:23-62:3, 91:11-93:19 (Steranko testifying that in the 1960s, Marvel’s check legends did not say “work for hire,” but indicated that Steranko “gave them the rights to the work, sold them the rights to the work”); Ex. 22 at 269:24-271:20 (Lieber testifying that the check legends used assignment, not work-for-hire language); Ex. 45 at 4142-4154, 4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975, expressly acknowledging Ayers’ “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”).

67. **As late as 1975, the legends on “Marvel’s” checks contained such express “assignment” of “copyright” language and no “work for hire” language whatsoever.** *See* Toberoff Decl. Ex. 2 at 100:3-101:9 (Lieber testifying that he was paid for his freelance material by check stamped with a legend that used assignment-type language); Ex. 9 ¶ 13 (Steranko attesting that legends on the backs of Marvel’s checks to him until at least 1973 used assignment, not work-for-hire, language); Ex. 21 at 61:23-62:3, 91:11-93:19 (Steranko testifying that in the 1960s, Marvel’s check legends did not say “work for hire”); Ex. 45 at KIRBY-4142-4154, KIRBY-4158-4164 (Marvel freelance checks made payable to Ayers dated from February 1, 1974 to July 4, 1975, acknowledging Ayers’ “assignment to [Marvel] of any copyright, trademark



and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”); Ex. 51 (Marvel freelance checks made payable to Gerber dated June 1, 1973, expressly acknowledging Gerber’s “assignment to [Marvel] of any copyright, trademark and any other rights in or related to the material, including [his] assignment of any rights to renewal copyright”).

68. **The earliest checks Marvel could produce with an endorsement legend mentioning “work for hire” are from 1986.** *See* Toberoff Decl. Ex. 98.

69. **In early 1966, Ditko, frustrated with Lee/Magazine Management’s failure to credit and pay him for his enormous role in the *Spider-Man* and *Dr. Strange* stories, refused to sell any more material to the company.** *See* Toberoff Decl. Ex. 3 at 44:22-46:12 (Romita testifying that Ditko quit *Spider-Man* because he had personal and professional conflicts with Lee); Ex. 20 at 57:13-59:3 (Evanier testifying that Ditko told him he had been promised additional compensation if his characters were used in other media); Ex. 24 at 124:5-24 (Levitz testifying that Ditko and Lee stopped speaking in the last year of Ditko’s time with Marvel because Ditko was not getting proper credit for his contributions).

70. **In 1963, Ditko created, plotted, and drew the first story of his celebrated character, the supernatural magician, Dr. Strange, published in *Strange Tales* No. 110.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko’s Dr. Strange character in *Strange Tales* No. 110); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko’s rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange

“‘twas [Ditko’s] idea,” in a contemporaneous letter dated January 9, 1963); Ex. 49 at 1 (first published appearance of Dr. Strange in *Strange Tales* No. 110).

71. **Ditko independently originated the character in 1946 more than a decade before he met Lee and began selling his work to Magazine Management.** *See* Toberoff Decl. Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 33 (Ditko’s letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an initial sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko’s early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived in Johnstown, PA at the address written on the letter envelope of composite Ex. 33, and that in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany).

72. **Lee acknowledged that Ditko was the originator of the character, which flowed from concepts Ditko had been playing with for years.** *See* Toberoff Decl. Ex. 1 at 121 (Evanier Rep. providing historical context of Lee’s admission that Ditko originated the idea and story for the Dr. Strange character); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko’s] idea,” in a contemporaneous letter dated January 9, 1963).

73. **Ditko’s 1946 sketch depicts Ditko’s early conception of his original Dr. Strange character long before the Period.** *See* Toberoff Decl. Ex. 33 (Ditko’s letter post-

marked August 6, 1946 to his brother Patrick Ditko enclosing an early sketch of Dr. Strange); Ex. 49 at 1 (first published appearance of Dr. Strange in *Strange Tales* No. 110); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko's early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived at the address written on the letter envelope of composite Ex. 33, and that, in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange "'twas [Ditko's] idea," in a contemporaneous letter dated January 9, 1963).

74. **Ditko's Dr. Strange character, as he appeared in *Strange Tales* No. 110 (1963) and later issues, was a meticulously crafted synthesis of various characters and narrative elements Ditko had been tinkering with in earlier years.** See Toberoff Decl. Ex. 62 at 4-5 (Dr. Strange used his hands to cast teleportation and other spells in *Strange Tales* No. 139 (1965)); Ex. 63 at 2 (same in *Strange Tales* No. 126 (1964)); Ex. 70 at 8-9 (same in *Strange Tales* No. 129 (1965)); compare Ex. 61 at 3 (Ditko's character used his hands to cast spells in 1959 in Charlton Comics' *Space Adventures* No. 27); see also Ex. 66 at 10 (in *Strange Tales* No. 137 (1965), Dr. Strange used a device—the Eye of Agamotto—to transport through space and time); compare Ex. 65 at 4-5 (In Charlton Comics' *Out of this World* No. 7 (1958), Ditko's character used similar artifact to transport characters in a swirl of visual effects through space and time); see also Ex. 68 at 4-5 (in *Strange Tales* No. 122 (1964), Dr. Strange traversed through different dimensions and journeyed through alternate planes of existence); Ex. 69 at 1 (same in *Strange Tales* No. 134 (1965)); compare Ex. 67 at Cover, 4-5 (Ditko used same effect in Charlton Comics' *Strange*

*Suspense* No. 32 (1957)); Ex. 33 (Ditko's letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an early sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko's early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived at the address written on the letter envelope of composite Ex. 33, and that, in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany).

75. **Ditko conceived, plotted and drew completely “on spec” a five-page story introducing Dr. Strange, which he presented to Lee, after which Magazine Management purchased the story.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of the first publication of Ditko's Dr. Strange character which began as a five-page story Ditko wrote and drew on spec introducing the character which he presented to Lee); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); *id.* at DITKO-0307 (Ditko explaining that Dr. Strange was a unique character who was a contradiction to Marvel's other superheroes and that the story started out as a five-page filler story); Ex. 27 (Ditko writing that he created the first *Dr. Strange* story and that he plotted and penciled most of the rest of the *Dr. Strange* stories and left Lee to dialogue them from Ditko's rough script); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange “‘twas [Ditko's] idea,” in a contemporaneous letter dated January 9, 1963 and noting the story was a “5-page filler”); Ex. 42 (Certificate of Renewal Registration of *Strange Tales* Vol. 1, No. 110, the issue in which Dr. Strange first appeared, dated December 27, 1991, claiming “Vista Publications, Inc.” as the original author and copyright claimant); Ex. 50 at

DETTWILER-0044-0058 (Don Heck's payment records identifying "Magazine Management" as the only entity that paid him for his freelance material in the Period); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as a "5-page filler," which was a great opportunity to try out all kinds of ideas like Dr. Strange, which "never fit in to Marvel's world of heroes"); Ex. 33 (Ditko's letter post-marked August 6, 1946 to his brother Patrick Ditko enclosing an early sketch of Dr. Strange); Ex. 59 at 61:15-65:14 (Patrick Ditko, being shown composite Ex. 33 and testifying that his brother, Steve Ditko, sent him this letter in 1946, while Ditko was in military service abroad, enclosing Ditko's early sketch of Dr. Strange (Ex. 33) and that he had found Ex. 33 at his home amongst letters he had kept from his brother); Ex. 23 at 166:5-168:8 (Mark Ditko testifying that his father lived at the address written on the letter envelope of composite Ex. 33, and that, in 1946 (postmarked on the letter envelope), his uncle Ditko was in the military, stationed abroad in Germany).

76. **The world of Dr. Strange was strikingly different from other "Marvel" series of the time but Lee liked it and bought it and many more tales of Ditko's Dr. Strange followed.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Dr. Strange as a character very different than any other character Marvel was publishing at the time); Ex. 25 at DITKO-0307 (Ditko explaining that Dr. Strange was a unique character who was a contradiction to Marvel's other superheroes); Ex. 30 at 2021MARVEL-0050281 (Lee writing that Dr. Strange "'twas [Ditko's] idea, and I figgered [sic] we'd give it a chance" in a letter dated January 9, 1963); Ex. 57 at 2 (Ditko writing that Dr. Strange started out as a "5-page filler," which was a great opportunity to try out all kinds of ideas like Dr. Strange, which "never fit in to Marvel's world of heroes").

77. **Ditko was selling work to other publishers, including Charlton Comics, at the**

**same time as selling to Marvel.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. describing Ditko’s common practice of selling freelance work to various publishers during the Period); Ex. 12 ¶ 18 (Evanier attesting that Ditko was submitting freelance *Spider-Man* material to Marvel but was also selling work to Charlton Comics at the same time); Ex. 23 at 160:2-8 (Mark Ditko testifying that Ditko was selling work to both Marvel and Charlton Comics in the 1960s); Ex. 35 at DITKO-0199 (Ditko writing about his work at Charlton Comics in the 1960s); Ex. 57 at 2 (Ditko writing about creating material for Charlton Comics and DC Comics); Exs. 103-107 (examples of Ditko’s stories published by Charlton Comics in 1962-1966).

78. **Ditko thereafter created a host of supporting characters and an entire mythology of Dr. Strange before he stopped selling his works to Magazine Management in 1966.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Dr. Strange and Ditko’s role in creating numerous supporting characters before he stopped selling work to Marvel in 1966); Ex. 25 at DITKO-0308 (Ditko explaining that Dr. Strange was his creation and at one point, he was doing all the stories, writing, and art for it); Ex. 26 at 83 (Lee writing concerning Dr. Strange: “Steve Ditko is one of the best plot men in the biz. When it comes to dreaming up story ideas, putting them together intricately, panel by panel, and utilizing the best of cinematic techniques, the guy’s a whiz. Thus, the spectacular saga that is about to knock you out was basically concocted by our own Mr. D[itko]”); *id.* (Lee writing concerning *Dr. Strange*: “After [Ditko] did the hard part—after he dreamed up the story and illustrated it in his own unique style—I then got to the fun part ... the dialog balloons and captions”).

79. **In 1962, as Magazine Management cast about for new superheroes, Jack Kirby and Lee worked on a character named “Spider-Man,” which Kirby said was based on an idea that he had developed with Joe Simon in the mid-1950s.** *See* Toberoff Decl. Ex. 1

at 20 (Evanier Rep. providing historical context of Spider-Man's creation and describing Kirby and Lee's initial work on a character named "Spider-Man" that was based on an idea developed by Joe Simon in the mid-1950s); Ex. 3 at 112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko's version of the character); Ex. 4 at 37:3-19 (Lee testifying that he did not like Kirby's version of Spider-Man, he liked Ditko's); Ex. 29 at 33-34 (Ditko writing that the Spider-Man character that Lee and Kirby had originally worked up was a version of "The Fly" character created by Joe Simon).

80. **At some point, it was decided to toss their early development of a character by that name and start over in a brand-new direction.** *See* Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man's creation and describing the decision to go in a direction with the character different from Kirby and Lee's initial character based on the one developed by Joe Simon in the mid-1950s); Ex. 3 at 112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko's version of the character); Ex. 4 at 37:3-19 (Lee testifying that he did not like Kirby's version of Spider-Man, he liked Ditko's); Ex. 29 at 34-35 (Ditko writing that the initial Kirby Spider-Man idea was tossed and Ditko created a brand new Spider-Man).

81. **Kirby insisted he was never paid for the pages he had drawn of that first version that was rejected by "Marvel."** *See* Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man's creation and noting Kirby's insistence that he was not paid for his initial work on Spider-Man).

82. **Ditko then devised an entirely new look and costume, and a new direction was charted for a very different Spider-Man character.** *See* Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man's creation and describing Ditko's

creation of a very different costume and direction for the character); Ex. 3 at 112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko's version of the Spider-Man character); Ex. 4 at 37:3-19 (Lee testifying that he did not like Kirby's version of Spider-Man, he liked Ditko's); Ex. 28 (Lee writing that Ditko was the co-creator of Spider-Man); Ex. 29 at 34-35 (Ditko writing that the initial Kirby Spider-Man idea was tossed and Ditko created a brand new Spider-Man); Ex. 29 at 34 (Ditko comparison depiction of Kirby's and Ditko's versions of the Spider-Man character).

83. **Ditko's conception of the Spider-Man character and Kirby's were very different.** *See* Toberoff Decl. Ex. 3 at 112:7-113:7 (Romita testifying that Kirby did some initial Spider-Man drawings but Lee did not like them and went with Ditko's version of the character); Ex. 4 at 37:3-19 (Lee testifying that he did not like Kirby's version of Spider-Man, he liked Ditko's); Ex. 29 at 34 (Ditko comparison depiction of Kirby's and Ditko's versions of the Spider-Man character).

84. **Ditko wrote on several occasions that the character and stories were all worked out without Lee ever writing an actual script.** *See* Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man's creation and describing Ditko's insistence that the character was worked out with Lee ever writing a script); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the story plotting of *Spider-Man* and just left Lee to do the dialogue and captions).

85. **That first *Spider-Man* story introduced not only Peter Parker (aka Spider-Man) but also his Aunt May and a rival at school, Flash Thompson—the first two members of what would eventually grow into a large supporting cast of friends and foes.** *See* Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man's creation and



identifying the characters introduced in the first several dozen issues of the *Spider-Man* story done by Ditko); Ex. 60 (*Amazing Fantasy* No. 15 introducing Spider-Man, Aunt May, and Flash Thompson).

86. **Lee admitted that Goodman did not think the new character would sell and thus forbade Lee to continue with it.** *See* Toberoff Decl. Ex. 1 at 20 (Evanier Rep. providing historical context of Spider-Man's creation and explaining Goodman's dislike of the character); Ex. 4 at 75:24-78:2, 130:21-134:6 (Lee testifying that Goodman hated the idea of Spider-Man, but Lee published the story anyway); Ex. 17 at 307:12-310:9 (Thomas testifying that Goodman hated the idea of *Spider-Man*, but Lee published it anyway); Ex. 56 at 89:8-90:11 (Lee testifying that Goodman hated the idea of the Spider-Man character but Lee published the story anyway, without Goodman's permission).

87. **Lee, enthusiastic about Ditko's Spider-Man, flouted Goodman's authority and published the story in *Amazing Fantasy* No. 15, anyway.** *See* Toberoff Decl. Ex. 4 at 75:24-78:2, 130:21-134:6 (Lee testifying that Goodman hated the idea of Spider-Man, but Lee published the story anyway); Ex. 17 at 307:12-310:9 (Thomas testifying that Goodman hated the idea of *Spider-Man*, but Lee published it anyway); Ex. 56 at 89:8-90:11 (Lee testifying that Goodman hated the idea of the Spider-Man character but Lee published the story anyway, without Goodman's permission).

88. **Months later, after its success became known, Spider-Man got its own title and an *Amazing Spider-Man* comic was launched.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Spider-Man's creation and explaining that after initial sales figures came in for the first *Spider-Man* story showing it was a success, Spider-Man got its own series); Ex. 56 at 89:8-90:11 (Lee testifying that *Spider-Man* got its own series after the first

story was a success).

89. **In short order, the cast swelled with supporting characters in the life of Peter Parker like J. Jonah Jameson and Mary Jane Watson, and Spider-Man foes like Dr. Octopus, The Sandman, The Green Goblin, Kraven the Hunter, The Vulture, The Scorpion and many, many more.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Spider-Man’s creation and identifying the characters introduced in the first several dozen issues of Ditko’s *Spider-Man* stories).

90. **All these characters and many others were created or co-created by Ditko, and firmly established well before Ditko left the comic, and stopped selling work to “Marvel” in early 1966.** *See* Toberoff Decl. Ex. 1 at 21 (Evanier Rep. providing historical context of Spider-Man’s creation and identifying the characters introduced in the first several dozen issues of the *Spider-Man* story done by Ditko); Ex. 7 at 223:18-225:20, 277:11-13 (Thomas testifying that Ditko did all the plotting on *Spider-Man* stories while Ditko and Lee were not speaking); Ex. 17 at 311:18-312:25 (Thomas testifying that Ditko, on his own, plotted and drew *Spider-Man* for more than one year before he left in 1966, did not work pursuant to the “Marvel Method,” and that Lee would not even know anything about the story until it was penciled and submitted by Ditko); Ex. 28 (Lee writing that Ditko was co-creator of Spider-Man and that Ditko did most of the plotting of *Spider-Man* and just left Lee to do the dialogue and captions).

91. **Many characters who appear in the *Spider-Man* stories (e.g., Aunt May, Norman Osborn, Electro, the Chameleon) actually sprouted from the tales Ditko had previously crafted and sold to Charlton Comics years earlier.** *See* Toberoff Decl. Ex. 73 at 6 (Norman Osborn’s first appearance in the *Spider-Man* series in 1965); Ex. 74 at 10 (Norman

Osborn's identity revealed to readers in *Amazing Spider-Man* No. 37 (1966)); *compare* Ex. 75 at 1-2 (Norman Osborn's precursor—including corporate villainy and distinct curled hairstyle—in 1957 in Charlton Comics' *Strange Suspense Stories* No. 33, *Director of the Board*); *see also* Ex. 60 at 2, 8 (*Amazing Fantasy* No. 15 (1962), the issue in which Spider-Man and Ditko's Aunt May character first appeared) *compare* Ex. 79, "All Those Eyes" at 1-3 (Aunt May's forerunner character appeared in Ditko's story in Charlton Comics' *Out of this World* No. 6 (1957)); *see also* Ex. 76 at 1, 4 (Ditko's Electro character in *Amazing Spider-Man* No. 9 (1964)); *compare* Ex. 77 at 1, 4-5 (Ditko's electrically powered man, the predecessor of Electro, first appeared in Charlton Comics' *Strange Suspense Stories* No. 48 (1960)); *see also* Ex. 78 at 1, 5-6, 8-9 (Ditko introduces the Chameleon—a character who used various masks to carry out his villainy—in *Amazing Spider-Man* No. 1 (1963)); *compare* Ex. 79, "All Those Eyes" at 2-3 (Chameleon precursor—a spy character who used various masks in his espionage with a similar back story as the Chameleon—appeared in Ditko's "All Those Eyes" story he sold to Charlton Comics in 1957); Ex. 86 (photos of spiderweb-patterned wood blocks created by Ditko in high school).

92. **Starting in at least early 1965 with the *Amazing Spider-Man* # 25 and *Strange Tales* # 135, respectively, and each issue thereafter until Ditko left in 1966, Ditko is publicly credited by Lee as originating and creating the plots of all the Spider-Man and Dr. Strange stories.** *See* Toberoff Decl. Ex. 71 at 159 (*Amazing Spider-Man* No. 25: "Sturdy Stevey Ditko dreamed up the plot of this tantalizing tale, and it's full of unexpected surprises!"); Ex. 72 at 225 (*Strange Tales* No. 135: "Plotted and Illustrated by Fandom's Favorite Fiend: Steve Ditko"); Ex. 82 (Lee explaining in January 9, 1966 published interview: **"I don't plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I'll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he's the genius of the world. We

were arguing so much over plot lines I told him to start making up his own stories. **He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next,** but it's interesting to work that way.”) (emphasis added); Ex. 83 at 7 (same).

93. **Ditko plotted, penciled, and inked dozens of *Amazing Spider-Man* stories and *Dr. Strange* stories in *Strange Tales*, as evidenced by Marvels hundreds of reprint payments to Ditko.** See Toberoff Decl. Ex. 80 (Marvel reprint payments to Ditko for penciling, inking, and plotting *Amazing Spider-Man* and *Dr. Strange* stories); Ex. 81 (hundreds of reprint payments to Ditko for his plotting, penciling, and inking of *Strange Tales* (abbreviated “ST”) *Dr. Strange* (“DRS”) and *Amazing Spider-Man* (“ASM”) stories.

94. **Lee admitted and was open about the fact that Ditko had taken over the plotting, penciling, and inking of the stories, leaving Lee merely to input the dialogue based on Ditko's notes.** See Toberoff Decl. Ex. 82 (Lee explaining in January 9, 1966 published interview: “**I don't plot Spider-Man any more. Steve Ditko, the artist, has been doing the stories.** I guess I'll leave him alone until sales start to slip. Since Spidey got so popular, Ditko thinks he's the genius of the world. We were arguing so much over plot lines I told him to start making up his own stories. **He won't let anybody else ink his drawings either. He just drops off the finished pages with notes at the margins and I fill in the dialogue. I never know what he'll come up with next,** but it's interesting to work that way.”) (emphasis added); Ex. 83 at 7 (same).

95. **Lee also acknowledged that he would “take any credit that isn't nailed down.”** See Toberoff Decl. Ex. 87 (“Stan writes in ‘Stan Lee's Soapbox’ ‘You know me, I'll take any credit that isn't nailed down’”).

96. Lee and Colan published a comic story exemplifying a Lee “plotting conference” in which Lee had essentially no story ideas. *See* Toberoff Decl. Ex. 97 at 3.

97. Lee established POW! in 2001 to produce films and television, and POW! has had a “first look” deal with Disney since 2006. *See* Toberoff Decl. Ex. 5 at 213:14-17; 228:7-12; Ex. 88; Ex. 89.

98. POW! can hardly be viewed as successful. In a decade it did not produce a single theatrical film or scripted live-action TV show, only a small animated show. *See* Toberoff Decl. Ex. 5 at 230:14-232:2.

99. On December 31, 2009, shortly after the Kirby family served notices of termination and just before Marvel filed its lawsuit against them, Disney bought a 10% stake in POW! for \$2,500,000. *See* Toberoff Decl. Ex 90 at 1.

100. On December 18, 2009, Disney also gratuitously extended Lee’s deal to January 1, 2015, even though it had just been extended the year before and was not due to expire, and Disney quadrupled POW’s compensation. *See* Toberoff Decl. Ex. 89; Ex. 91 ¶ 2.

101. Under this 2009 amendment, POW! is to receive a minimum of \$11,000,000 over five years, even if it produces no films or television shows. *See* Toberoff Decl. Ex. 91 ¶¶ 2, 5-6, 8.

102. Lee testified on direct examination that Marvel’s checks always had “work for hire” language on the back and on June 11, 2007 Lee signed under oath an affidavit for Marvel stating: “I received checks from Timely and its successors that bore a legend acknowledging that the payment was for ‘works for hire’” for works published in the 1950s and 1960s, and that he “can recall no checks that [he] received that did not bear this legend.” *See* Toberoff Decl. Ex. 4 at 28:20-29:11; Ex. 92 ¶ 13; Ex. 93 ¶ 2.

103. **Lee’s testimony contradicts all the record evidence.** *See* Toberoff Decl. Ex. 45; Ex. 94 at Ex. C; Ex. 8 ¶¶ 13-14; Ex. 11 ¶ 12; Ex. 10 ¶ 14; Ex. 9 ¶ 12; Ex. 13 ¶¶ 14-15.

104. **On cross, Lee was forced to admit that, as late as 1974, Marvel’s checks contained “assignment” language, not “work for hire” language and that he did not know when the “work for hire” legend first appeared.** *See* Toberoff Decl. Ex. 5 at 276:12-278:1; 280:21-281:12; Ex. 95 at 141:9-142:21.

105. **Lee has repeatedly acknowledged in numerous authenticated statements that he has a very poor memory.** *See* Toberoff Decl. Ex. 96 at JA1955; Ex. 5 at 284:10-18.

106. **Lieber has worked on Lee’s syndicated *Spider-Man* strip for 23 years.** *See* Toberoff Decl. Ex. 2 at 7:18-23.

107. **This was Lieber’s sole livelihood, for which his brother Lee paid him a small salary each year.** *See* Toberoff Decl. Ex. 2 at 59:2-19.

108. **To recruit witnesses after the Kirby family served copyright notices of termination, Marvel invited Lieber to a “reunion of old-timers,” but Lieber declined.** *See* Toberoff Decl. Ex. 2 at 51:20-52:23.

109. **Thereafter, Stan Lee leaned on his brother.** *See* Toberoff Decl. Ex. 2 at 58:19-59:19 (Lieber: “He didn’t tell I shouldn’t, but he sort of said, ‘Well I hope you don’t lose the [*Spider-Man*] strip because of it or something.’”).

110. **At the time of Thomas’s deposition in this case, he was contractually bound by Marvel to not “support, directly or indirectly, on behalf of [himself] or any other person or entity, any action, claim, litigation, filing, statement, or demand, in any court ... challenging Marvel’s ownership” or characters or stories.** *See* Toberoff Decl. Ex. 99 ¶ 2(d).

111. **At least one third of Thomas’s income is made up of “incentive payments”**

paid to him by Marvel, at Marvel's sole discretion. *See* Toberoff Decl. Ex. 17 at 239:2-241:16.

112. Thomas admitted that, because he started at Magazine Management in July 1965, he essentially has no direct knowledge of how Ditko created his characters and stories during almost the entire Period. *See* Toberoff Decl. Ex. 17 at 248:25-265:4.

Date: June 30, 2023

By: /s/ Marc Toberoff  
Marc Toberoff

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